

THE
WORKS
OF
M. DE SECONDAT,
BARON DE MONTESQUIEU.

TRANSLATED FROM THE FRENCH.

IN THREE VOLUMES.

VOL. II.

SPIRIT OF LAWS.

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WORKS

M. DE SCHOONHOUT

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CONTENTS.

BOOK XXI. *Of Laws relative to Commerce, considered in the Re- volutions it has met with in the World.*

	Page
CHAP. I. Some General Considerations,	1
II. Of the People of Africa,	2
III. That the Wants of the People in the South are different from those of the North,	ibid.
IV. The principal difference between the Commerce of the Ancients and Moderns,	3
V. Other differences,	4
VI. Of the Commerce of the Ancients,	5
VII. Of the Commerce of the Greeks, and that of Egypt, af- ter the conquest of Alexander,	12
VIII. Of Carthage and Marfeilles,	21
IX. Of the Genius of the Romans as to maritime affairs,	26
X. Of the Genius of the Romans with respect to Commerce,	ibid.
XI. Of the Commerce of the Romans with the Barbarians,	28
XII. Of the Commerce of the Romans with Arabia and the Indies,	29
XIII. Of Commerce after the destruction of the Western Em- pire,	30
XIV. A particular Regulation,	31
XV. Of Commerce after the decay of the Roman Power in the East,	32
XVI. How Commerce broke through the barbarism of Eu- rope,	ibid.
XVII. The Discovery of two New Worlds, and in what man- ner Europe is affected by it,	35
XVIII. Of the Riches which Spain drew from America,	39
XIX. A Problem,	43

BOOK XXII. *Of Laws in relation to the Use of Money.*

CHAP. I. The reason of the use of Money,	44
II. Of the nature of Money,	45

CHAP. III. Of Ideal Money,	47
IV. Of the quantity of Gold and Silver,	48
V. The reason why Interest was lowered one half after the conquest of the Indies,	49
VI. How the price of things is fixt in the variation of the sign of Riches,	50
VII. Of the relative scarcity of Gold and Silver,	52
VIII. Of Exchange,	ibid.
IX. Of the proceedings of the Romans with respect to Money,	62
X. The circumstances in which the Romans changed the value of their Specie,	63
XI. Proceedings with respect to Money in the time of the Emperors,	65
XII. How the Exchange is a constraint on Despotic Power,	66
XIII. The practice of some Countries in Italy,	67
XIV. The assistance a State may derive from Bankers,	ibid.
XV. Of Public Debts,	68
XVI. Of the Payment of Public Debts,	69
XVII. Of Lending upon Interest,	71
XVIII. Of Maritime Usury,	72
XIX. Of Lending by contract, and the State of Usury amongst the Romans,	ibid.

BOOK XXIII. *Of Laws in the relation they bear to the number of Inhabitants.*

CHAP. I. Of Men and Animals with respect to the multiplication of their Species,	76
II. Of Marriage,	77
III. Of the Condition of Children,	78
IV. Of Families,	79
V. Of the several orders of Lawful Wives,	ibid.
VI. Of Laws in relation to Bastards,	80
VII. Of the Fathers consent to Marriage,	81
VIII. Of Young Women,	83
IX. What it is that determines to Marriage,	ibid.
X. Of the Severity of Government,	ibid.
XI. Of the number of Males and Females in different Countries,	84
XII. Of Sea-port Towns,	85
XIII. Of the productions of the Earth which require a greater or a less number of Men,	86
XIV. Of the number of Inhabitants with relation to the Arts,	87
XV. The concern of the Legislator in the propagation of the Species,	88

CONTENTS.

CHAP. XVI. Of Greece, and the number of its inhabitants,	ibid.
XVII. Of the State and number of people before the Romans,	90
XVIII. Of the Depopulation of the Universe,	ibid.
XIX. That the Romans were under a necessity of making Laws to encourage the propagation of the Species,	91
XX. Of the Laws of the Romans relating to the propagation of the Species,	92
XXI. Of the Exposing of Children,	103
XXII. Of the State of the Universe after the destruction of the Romans,	104
XXIII. The changes which happened in Europe, with regard to the number of Inhabitants,	105
XXIV. Consequences,	106
XXV. Of the Laws made in France to encourage the propa- gation of the Species,	107
XXVI. By what means we may remedy a Depopulation,	ibid.
XXVII. Of Hospitals,	108

BOOK XXIV. *Of Laws as relative to Religion, considered in it- self and in its Doctrines.*

CHAP. I. Of Religion in general,	110
II. A Paradox of Mr Bayle's,	111
III. That a Moderate Government is most agreeable to the Christian religion, and a Despotic Government to the Mahometan,	113
IV. Consequences from the character of the Christian religion, and that of the Mahometan,	114
V. That the Catholic religion is most agreeable to a Mo- narchy, and the Protestant to a Republic,	115
VI. Another of Mr Bayle's Paradoxes,	116
VII. Of the Laws of Perfection in Religion,	117
VIII. Of the connection between the moral Laws and those of Religion,	ibid.
IX. Of the Essenes,	118
X. Of the sect of Stoics,	ibid.
XI. Of Contemplation,	119
XII. Of Penance,	120
XIII. Of inexpiable Crimes,	ibid.
XIV. In what manner Religion has an influence on civil Laws,	121
XV. How false Religions are sometimes corrected by the civil Laws,	123
XVI. How the laws of Religion correct the inconveniencies of a Political Constitution,	124

CHAP. XVII. How the Laws of Religion have the effect of civil Laws,	125
XVIII. That it is not so much the truth or falsity of a Doctrine which renders it useful or pernicious to men in civil Government, as the use or abuse which is made of it,	126
XIX. Of the Metempsychosis,	128
XX. That it is dangerous for Religion to inspire an aversion for things in themselves indifferent,	ibid.
XXI. Of Festivals,	129
XXII. Of the local Laws of Religion,	130
XXIII. The inconveniency of Transplanting a Religion from one Country to another,	131

BOOK XXV. *Of Laws as relative to the Establishment of Religion and its External Policy.*

CHAP. I. Of Religious Sentiments,	133
II. Of the motives of attachment to different Religions,	ibid.
III. Of Temples,	135
IV. Of the Ministers of Religion,	137
V. Of the bounds which the Laws ought to prescribe to the Riches of the Clergy,	139
VI. Of Monasteries,	140
VII. Of the luxury of Superstition,	141
VIII. Of the Pontificate,	142
IX. Of Toleration in point of Religion,	143
X. Of Changing a Religion,	144
XI. Of Penal Laws,	ibid.
XII. A most humble Remonstrance to the Inquisitors of Spain and Portugal,	145
XIII. Why the Christian Religion is so odious in Japan,	148
XIV. Of the Propagation of Religion,	149

BOOK XXVI. *Of Laws as relative to the order of things on which they determine.*

CHAP. I. Idea of this Book,	150
II. Of Laws Divine and Human,	151
III. Of Civil Laws contrary to the Laws of Nature,	152
IV. Cases in which we may judge by the Principles of the Civil Law in limiting the Principles of the law of Nature,	154

CONTENTS.

vii

- V. That the order of Succession or Inheritance depends on the Principles of Political or Civil Law, and not on those of the Law of Nature, 155
- VI. That we ought not to decide by the Precepts of Religion what belongs only to the Law of Nature, 157
- VII. That we ought not to regulate by the Principles of the Canon Law, things which should be regulated by those of the Civil Law, 158
- VIII. That things which ought to be regulated by the Principles of Civil Law can seldom be regulated by those of Religion, 159
- IX. In what case we ought to follow the Civil Law which permits, and not the Law of Religion which forbids, 161
- X. That human Courts of Justice should not be regulated by the maxims of those Tribunals which relate to the other life, *ibid.*
- XI. In what cases, with regard to Marriages, we ought to follow the Laws of Religion, and in what cases we should follow the Civil Laws, 162
- XII. In what instances Marriages between Relations should be regulated by the Law of Nature; and in what instances by the Civil Laws, 164
- XIII. That we should not regulate by the Principles of Political Law, those things which depend on the Principles of Civil Law, 168
- XIV. That we ought not to decide by the Rules of the Civil Law, when it is proper to decide by those of the Political Law, 170
- XV. That it is necessary to enquire, whether the Laws which seem contradictory are of the same Class, 172
- XVI. That we ought not to decide those things by the Civil Laws, which ought to be decided by Domestic Laws, 173
- XVII. That we ought not to decide by the Principles of the Civil Laws, those things which belong to the Law of Nations, *ibid.*
- XVIII. That we should not decide by Political Laws, things which belong to the Law of Nations, 174
- XIX. The unhappy state of the Inca Athualpa, 175
- XX. That when, by some circumstance, the Political Law becomes destructive to the State, we ought to decide by such a Political Law as will preserve it, which sometimes becomes a Law of Nations, *ibid.*
- XXI. That the Regulations of the Police are of a different Class from other Civil Laws, 17
- XXII. That we should not follow the general dispositions of the Civil Law, in things which ought to be subject to particular Rules drawn from their own Nature, 178

BOOK XXVII. *Of the Origin and Revolutions of the Roman Laws on Successions.*

CHAP. I. Of the Roman Laws on Successions, 179

BOOK XXVIII. *Of the Origin and Revolutions of the Civil Laws among the French.*

CHAP. I. Different Character of the Laws of the several People of Germany,	189
II. That the Laws of the Barbarians were all Personal,	192
III. Capital Difference between the Salic Laws, and those of the Visigoths and Burgundians,	193
IV. In what manner the Roman Law came to be lost in the Country subject to the Franks, and preserved in that subject to the Goths and Burgundians,	195
V. How the Roman Law kept its ground in the Demefne of the Lombards,	199
VI. How the Roman Law came to be lost in Spain,	200
VII. A false Capitulary,	201
VIII. In what manner the Codes of Barbarian Laws and the Capitularies came to be lost,	202
IX. Other causes of the difuse of the Codes of Barbarian Laws, as well as of the Roman Law, and of the Capitularies,	204
X. Of Local Customs. Revolution of the Laws of barbarous Nations, as well as of the Roman Law,	205
XI. Difference between the Salic Law or that of the Salian Franks, and that of the Ripuarian Franks and other barbarous Nations,	207
XII. Another Difference,	209
XIII. A Reflection,	210
XIV. Of the Ordeal or Trial by boiling water, established by the Salic Law,	ibid.
XV. Particular notions of our Ancestors,	211
XVI. In what manner the custom of Judicial Combats gained ground,	214
XVII. A new reason of the difuse of the Salic and Roman Laws, as also of the Capitularies,	219
XVIII. Origin of the point of Honour,	220
XIX. A new Reflection upon the point of Honour among the Germans,	223

CONTENTS.

ix

CHAP. XX. Of the Manners relative to Judicial Combats,	223
XXI. Of the Code of Laws on Judicial Combats,	225
XXII. Rules established in the Judicial Combats,	226
XXIII. Of the bounds prescribed to the custom of Judicial Combats,	228
XXIV. Of the Judiciary Combat between one of the parties and one of the witnesses,	230
XXV. Of the Judicial Combat between one of the Parties and one of the Lord's Peers. Appeal of False Judgment,	231
XXVI. Of the Appeal of default of Justice,	238
XXVII. Epoch of the Reign of St. Lewis,	242
XXVIII. Observations on Appeals,	246
XXIX. In what manner the proceedings at Law became secret,	248
XXX. Of the Costs,	250
XXXI. Of the public Prosecutor,	251
XXXII. In what manner the Institutions of St. Lewis fell into Oblivion,	254
XXXIII. In what manner the judiciary forms were borrowed from the decretals,	260
XXXIV. Flux and reflux of the ecclesiastic and temporal jurisdiction,	261
XXXV. The revival of the Roman Law, and the result thereof. Change in the tribunals,	263
XXXVI. Of the proof by witnesses,	266
XXXVII. Of the Customs of France,	267

BOOK XXIX. *Of the manner of composing Laws.*

CHAP. I. Of the spirit of the Legislator,	270
II. That the Laws which seem to deviate from the views of the Legislator, are frequently agreeable to them,	271
III. Of the Laws that are contrary to the views of the Legislator,	272
IV. That Laws which appear the same, have not always the same effect,	273
V. Necessity of composing Laws in a proper manner,	Ibid.
VI. That the Laws which appear the same, were not always made through the same motive,	274
VII. That the Greek and Roman Laws punished suicide, but not through the same motive,	275
VIII. That the Laws which seem contrary, proceed sometimes from the same spirit,	276

CHAP. IX. How we are to judge of the difference of Laws,	276
X. That Laws which appear the same, are sometimes really different,	
XI. That we must not separate the Laws from the end for which they were made : of the Roman Laws on Theft,	278
XII. That we must not separate the Laws from the circumstances in which they were made,	280
XIII. That sometimes it is proper the Law should amend itself,	281
XIV. Things to be observed in the composing of Laws,	282
XV. A bad method of giving Laws,	287
XVI. Of the ideas of uniformity,	288
XVII. Of Legislators,	ibid.

BOOK XXX. *Theory of the feudal Laws among the Franks, in the relation they bear to the establishment of the Monarchy.*

CHAP. I. Of feudal Laws,	289
II. Of the source of feudal Laws,	290
III. The origin of Vassalage,	291
IV. Of the conquests of the Franks,	293
V. Of the Goths, Burgundians, and Franks,	294
VI. Different ways of dividing Lands,	ibid.
VII. A just application of the Law of the Burgundians, and of that of the Visigoths, in relation to the division of Lands,	296
VIII. Of Servitudes,	297
IX. That the Lands belonging to the division of the Barbarians paid no taxes,	301
X. Of taxes paid by the Romans and Gauls, in the Monarchy of the Franks,	303
XI. Of what they called <i>Census</i> ,	306
XII. That what they called <i>Census</i> was raised only on the bondmen, and not on the freemen,	309
XIII. Of the Feudal Lords or Vassals,	311
XIV. Of the military service of Freemen,	313
XV. Of the double service,	316
XVI. Of the compositions among the barbarous nations,	318
XVII. Of what was afterwards called the Jurisdiction of the Lords,	323
XVIII. Of the territorial Jurisdiction of the Churches,	327
XIX. That the Jurisdictions were established before the end of the second race,	330
XX. General idea of the Abbe Du Bos's book on the establishment of the French Monarchy in Gaul,	333
XXI. Of the French Nobility,	338

CONTENTS.

xi

BOOK XXXI. *Theory of the feudal Laws among the Franks, in the relation they bear to the revolutions of their Monarchy.*

CHAP. I. Changes in the offices and in the fiefs. Of the Mayors of the Palace.	345
II. How the civil Government was reformed,	349
III. Authority of the Mayors of the Palace,	352
IV. Of the genius of the nation in regard to the Mayors,	354
V. In what manner the Mayors obtained the command of the Armies,	355
VI. Second epocha of the humiliation of our Kings of the first race,	357
VII. Of the great offices and fiefs under the Mayors of the palace,	358
VIII. In what manner the allodial estates were changed into fiefs,	360
IX. How the Church-Lands were converted into fiefs,	363
X. Riches of the Clergy,	365
XI. State of Europe at the time of Charles Martel,	366
XII. Establishment of the Tithes,	369
XIII. Of the elections of Bishops and Abbots,	372
XIV. Of the fiefs of Charles Martel,	373
XV. Confusion of the royalty and mayoralty. The second race,	374
XVI. A particular thing in the election of the Kings of the second race,	376
XVII. CHARLEMAGNE,	378
XVIII. The successors of CHARLEMAGNE,	380
XIX. That the freemen were rendered capable of holding fiefs,	384
XX. The principal cause of the humiliation of the second race. Changes in the allodia,	386
XXI. Changes in the fiefs,	388
XXII. Another change which happened in the fiefs,	390
XXIII. Changes which happened in the great offices, and in the fiefs,	391
XXIV. Of the nature of the fiefs after the reign of Charles the Bald,	393
XXV. In what manner the empire was transferred from the family of Charlemagne,	395
XXVI. In what manner the crown of France was transferred to the house of Hugh Capet,	396
XXVII. Some consequences of the perpetuity of fiefs,	397

THE

CONTENTS

347	BOOK XXI. History of the French Revolution, from the
348	349
350	351
352	353
354	355
356	357
358	359
360	361
362	363
364	365
366	367
368	369
370	371
372	373
374	375
376	377
378	379
380	381
382	383
384	385
386	387
388	389
390	391
392	393
394	395
396	397
398	399
400	401
402	403
404	405
406	407
408	409
410	411
412	413
414	415
416	417
418	419
420	421
422	423
424	425
426	427
428	429
430	431
432	433
434	435
436	437
438	439
440	441
442	443
444	445
446	447
448	449
450	451
452	453
454	455
456	457
458	459
460	461
462	463
464	465
466	467
468	469
470	471
472	473
474	475
476	477
478	479
480	481
482	483
484	485
486	487
488	489
490	491
492	493
494	495
496	497
498	499
500	501
502	503
504	505
506	507
508	509
510	511
512	513
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516	517
518	519
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522	523
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526	527
528	529
530	531
532	533
534	535
536	537
538	539
540	541
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544	545
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984	985
986	987
988	989
990	991
992	993
994	995
996	997
998	999
1000	1001



THE SPIRIT OF LAWS.

BOOK XXI.

Of Laws relative to Commerce, considered in the Revolutions
it has met with in the World.

CHAP. I.

Some General Considerations.

THOUGH commerce be subject to great revolutions, yet it is possible that certain physical causes, as the qualities of the soil, or the climate, may fix its nature for ever.

We at present carry on the trade of the Indies merely by means of the silver which we send thither. The (a) Romans carried annually thither about fifty millions of sesterces; and this silver, as ours is at present, was exchanged for merchandises which were brought to the west. Every nation that ever traded to the Indies, has constantly carried bullion, and brought merchandize in return.

It is nature herself that produces this effect. The Indians have their arts adapted to their manner of living. Our luxury cannot be theirs; nor their wants ours. Their climate neither demands nor permits hardly any thing which comes from us. They go in a great measure naked; such cloaths as they have, the country itself furnishes; and their religion, which is deep-

VOL. II.

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(a) Pliny Lib. 6. chap. 23.

ly rooted, gives them an aversion for those things that serve for our nourishment. They want therefore nothing but our bullion, to serve as the medium of value, and for this they give merchandises in return, with which the frugality of the people, and the nature of the country, furnishes them in great abundance. Those antient (b) authors who have mentioned the Indies, describe them just as we find them, as to their policy, customs, and manners. The Indies have ever been, they will ever be, the same Indies they are at present; and in every period of time, those who trade to that country must carry specie thither, and bring none in return.

CHAP. II.

Of the People of Africa.

THE greatest part of the people on the coast of Africa are savages and barbarians. The principal reason, I believe, of this is, because the small countries capable of being inhabited, are separated from each other by large and almost uninhabitable tracts of land. They are without industry or arts. They have gold in abundance, which they receive immediately from the hand of nature. Every civilized state is therefore in a condition to traffic with them to advantage; by raising their esteem for things of no value, and receiving a very high price in return.

CHAP. III.

That the wants of the People in the South are different from those of the North.

IN Europe there is a kind of balance between the southern and northern nations. The first have every convenience of life,

(b) See Pliny, Book. 6. Chap. 19. and Strabo, Book 15.



life, and few of its wants : the last have many wants and few conveniencies. To one, nature has given much, and demands but little ; to the others, she has given but little, and demands a great deal. The equilibrium is maintained by the laziness of the southern nations, and by the industry and activity which she has given to those in the north. The latter are obliged to undergo excessive labour, without which they would want every thing, and degenerate into barbarians. This has naturalized slavery to the people of the south : as they can easily dispense with riches, they can more easily dispense with liberty. But the people of the north have need of liberty, for this can best procure them the means of satisfying all those wants which they have received from nature. The people of the north, then, are in a forced state, if they are not either free or barbarians. Almost all the people of the south are in some measure in a state of violence, if they are not slaves.

CHAP. IV.

The principal Difference between the Commerce of the Antients and the Moderns.

THE world has found itself, from time to time, in different situations ; by which the face of commerce has been altered. The trade of Europe is at present carried on principally from the north to the south ; and the difference of climates is the cause that the several nations have great occasion for the merchandises of each other. For example, the liquors of the south, which are carried to the north, form a commerce little known to the ancients. Thus the burden of vessels, which was formerly computed by measures of corn, is at present determined by tons of liquor.

The antient commerce, as far as it is known to us, was carried on from one port in the Mediterranean to another ; and was

almost wholly confined to the south. Now the people of the same climate, having nearly the same things of their own, have not the same need of trading amongst themselves as with those of a different climate. The commerce of Europe was therefore formerly less extended than at present.

This does not at all contradict what I have said of our commerce to the Indies : for here the prodigious difference of climate destroys all relation between their wants and ours.

CHAP. V.

Other Differences.

COMMERCE is sometimes destroyed by conquerors, sometimes cramped by monarchs ; it traverses the earth, flies from the place where it is oppressed, and stays where it has liberty to breathe : it reigns at present where nothing was formerly to be seen but deserts, seas, and rocks ; and where it once reigned, now there are only deserts.

To see Colchis in its present situation, which is no more than a vast forest, where the people are every day decreasing, and only defend their liberty to sell themselves by piece-meal to the Turks and Persians ; one could never imagine, that this country had ever, in the time of the Romans, been full of cities, where commerce convened all the nations of the world. We find no monuments of these facts in the country itself ; there are no traces of them, except in (a) Pliny and (b) Strabo.

The history of commerce is that of the communication of people. Their numerous defeats, and the flux and reflux of populations and devastations, here form the most extraordinary events.

CHAP.

(a) Lib. 6.

(b) Lib. 2.

CHAP. VI.

Of the Commerce of the Ancients.

THE immense treasures of Semiramis (c), which could not be acquired in a day, give us reason to believe, that the Assyrians themselves had pillaged other rich nations, as other nations afterwards pillaged them.

The effects of commerce is riches, the consequence of riches, luxury; and that of luxury, the perfection of arts. We find that the arts were carried to great perfection in the time of Semiramis (d); which is a sufficient indication, that a considerable commerce was then established.

In the empires of Asia there was a great commerce of luxury. The history of luxury would make a fine part of that of commerce. The luxury of the Persians was that of the Medes, as the luxury of the Medes was that of the Assyrians.

Great revolutions have happened in Asia. The north-east parts of Persia, viz. Hyrcania, Margiana, Bactria, &c. were formerly full of flourishing cities (e), which are now no more; and the north of this (f) empire, that is the isthmus which separates the Caspian and the Euxine seas, was covered with cities and nations, which are now destroyed.

Eratoſthenes (g) and Ariſtobulus learn from Patroclus, that the merchandises of India passed by the Oxus into the sea of Pontus. Marcus Varro (h) tells us, that the time when Pompey commanded against Mithridates, they were informed, that people went in seven days from India to the country of the Bactrians, and to the river Icarus, which falls into the Oxus; that, by this means, they were able to bring the merchandises of India across the Caspian sea, and to enter the mouth of the Cyrus; from whence it

(c) Diodorus lib. ii. (d) Ibid. (e) Pliny Lib. vi. Chap. 16. and Strabo, Lib. xi.

(f) See Strabo, Lib. xi.

(g) Ibid.

(h) See Pliny, Lib. vi. Chap. 17. See also Strabo, Lib. xi. upon the passage by which the merchandises were conveyed from the Phasis to the Cyrus.

it was only five days journey to the Phasis, a river that discharges itself into the Euxine sea. There is no doubt but it was by the nations inhabiting these several countries, that the great empires of the Assyrians, Medes, and Persians, had a communication with the most distant parts of the east and west.

An entire stop is now put to this communication. All these countries have been laid waste by the § Tartars, and are still infested by this destructive nation. The Oxus no longer runs into the Caspian sea; the Tartars, for some private † reasons, have changed its course, and it now loses itself in the barren sands.

The Jaxartes, which was formerly a barrier between the polite and the barbarous nations, has had its course turned in the same manner by the Tartars, and it no longer empties itself into the sea.

Seleucus Nicator formed (b) the project of joining the Euxine to the Caspian sea. This project, which would have greatly facilitated the commerce of those days, vanished at his || death. We are not certain it could have been executed in the isthmus which separates the two seas. This country is at present very little known; it is depopulated, and full of forests; indeed water is not wanting, for an infinite number of rivers roll into it from Mount Caucasus: but as this mountain forms the north of the isthmus, and extends like two arms (a) towards the south, it would have been a grand obstacle to such an enterprise, especially in those times when they had not the art of making sluices.

It may be imagined, that Seleucus would have joined the two seas in the very place where Peter I. has since joined them; that
is,

§ This is the reason why those who have described this country since it has been in the possession of the Tartars, have entirely disfigured it. The chart made of the Caspian sea, by order of the late Czar Peter-I. has discovered the egregious errors of our modern ones; and by this it appears, that this sea is conformable to the representations of the ancients. See Pliny, Lib. vi. Cap. 12.

† See Jenkinson's account of this, in the collection of Voyages to the North. Vol. IV.

|| He was slain by Ptolemy-Cerannus.

(a) Strabo, lib. xi.

(b) Claudius Cæsar, in Plin. Lib. vi. Chap. 11.

is, in that neck of land where the Tanais approaches the Volga : but the north of the Caspian sea was not then discovered.

While the empires of Asia enjoyed the commerce of luxury, the Tyrians had the commerce of œconomy, which they extended through the world. Bochard has employed the first book of his Canaan, in enumerating the colonies which they sent into all the countries bordering upon the sea : they passed the pillars of Hercules, and made establishments * on the coast of the ocean.

In those times their pilots were obliged to follow the coasts, which were, if I may so express myself, their compass. Voyages were long and painful. The laborious voyage of Ulysses has been the fruitful subject of the finest poem in the world, next to that which alone has the preference.

The little knowledge which the greatest part of the world had of those who were far distant from them, favoured the nations engaged in the œconomical commerce. They managed trade with as much obscurity as they pleased : they had all the advantages which the most intelligent nations could take over the most ignorant.

The Egyptians, a people who by their religion and their manners were averse to all communication with strangers, had scarcely at that time any foreign trade. They enjoyed a fruitful soil, and great plenty. Their country was the Japan of those times ; it possessed every thing within itself.

So little jealous were these people of commerce, that they left that of the Red Sea to all the petty nations that had any harbours in it. Here they suffered the Idumeans, the Syrians, and the Jews to have fleets ; Solomon (a) employed in this navigation the Tyrians, who knew these seas.

Josephus (b) says, that his nation being entirely employed in agriculture, knew little of navigation : the Jews therefore traded only occasionally in the Red Sea. They took from the Idumeans

* They founded Tartessus, and made a settlement at Cadiz.

(a) Kings, lib. i. chap. 9. Chronicles lib. ii. chap. 8.

(b) Against Appian.

Idumeans Eloth and Eziongeber, from whom they received this commerce; they lost these two cities, and with them lost this commerce.

It was not so with the Phœnicians: theirs was not a commerce of luxury; nor was their trade owing to conquest: their frugality, their abilities, their industry, their perils, and the hardships they suffered, rendered them necessary to all the nations of the world.

Before Alexander, the people bordering on the Red Sea traded only in this sea, and in that of Africa. The astonishment which filled the universe at the discovery of the Indian sea, under that conqueror, is of this a sufficient proof. I have observed (c), that bullion was always carried to the Indies, and never any brought from hence; now the Jewish fleets, which brought gold and silver by the way of the Red Sea, returned from Africa, and not from the Indies.

Besides, this navigation was made on the eastern coast of Africa; for the state of navigation at that time is a convincing proof that they did not sail to a very distant shore.

I am not ignorant, that the fleets of Solomon and Jehosaphat returned only every three years; but I do not see that the time taken up in the voyage is any proof of the greatness of the distance.

Pliny and Strabo inform us, that the junks of India and the Red Sea were twenty days in performing a voyage, which a Greek or Roman vessel would accomplish in (d) seven. In this proportion, a voyage of one year made by the fleets of Greece or Rome, would take very near three, when performed by those of Solomon.

Two ships of equal swiftmess do not perform their voyage in time proportionate to their swiftmess. Slowness is frequently the cause of much greater slowness. When it becomes necessary

(c) Chap. I. of this Book.

(d) See Pliny, lib. vi. chap. 22, and Strabo, lib. xv.

fary to follow the coasts, and to be incessantly in a different position, when they must wait for a fair wind to get out of a gulph, and for another to proceed ; a good failor takes the advantage of every favourable moment, while the other still continues in a difficult situation, and waits many days for another change.

This slowness of the Indian vessels, which in an equal time could make but the third of the way of those of the Greeks and Romans, may be explained by what we every day see in our modern navigation. The Indian vessels, which were built with a kind of sea-rushes, drew less water than those of Greece and Rome, which were of wood, and joined with iron.

We may compare these Indian vessels to those at present made use of in ports of little depth of water. Such are those of Venice, and even of all * Italy in general, of the Baltic, and of the province of † Holland. Their ships, which ought to be able to go in and out of port, are built round and broad at the bottom ; while those of other nations, who have good harbours, are formed to sink deep into the water. This mechanism renders these last mentioned vessels able to sail much nearer the wind ; while the first can hardly sail, except the wind be nearly in the poop. A ship that sinks deep into the water sails towards the same side with almost every wind ; this proceeds from the resistance which the vessel, whilst driven by the wind, meets with from the water, from which it receives a strong support ; and from the length of the vessel which presents its sides to the wind, while from the form of the helm the prow is turned to the point proposed ; so that she can sail very near to the wind, or, in other words, very near to the point from whence the wind blows. But when the hull is round and broad at the bottom, and consequently draws little water, it no longer finds this steady support ; the wind drives the vessel, which is incap-

Vol. II.

B

able

* They are mostly shallow ; but Sicily has excellent ports.

† I say the province of Holland, for the ports of Zealand are deep enough.

able of resistance, and can run then but with a small variation from the point opposite to the wind. From whence it follows, that broad bottomed vessels are longer in performing voyages.

1. They lose much time in waiting for the wind, especially if they are obliged frequently to change their course. 2. They sail much slower, because not having a proper support from a depth of water, they cannot carry so much sail. If this be the case at a time when the arts are every where known, at a time when art corrects the defects of nature, and even of art itself; if at this time, I say, we find this difference, how great must that have been in the navigation of the ancients?

I cannot yet leave this subject. The Indian vessels were small, and those of the Greeks and Romans, if we except their machines built for ostentation, much less than ours. Now the smaller the vessel, the greater danger it encounters from foul weather. A tempest that would swallow up a small vessel, would only make a large one roll. The more one body is surpassed by another in bigness, the more its surface is relatively small. From whence it follows, that in a small ship there is a greater difference as to the surface of the vessel, and the weight or lading she can carry, than in a large one. We know that it is a pretty general practice, to make the weight of the lading equal to that of half the water the vessel is able to contain. Suppose a vessel will contain eight hundred tons, her lading then must be four hundred; and that of a vessel which would hold but four hundred tons of water, would be two hundred tons. Thus the largeness of the first ship will be to the weight she carries, as 8 to 4; and that of the second, as 4 to 2. Let us suppose then, that the surface of the greater is to the surface of the smaller, as 8 to 6: the surface of this will be to her weight as 6 to 2, while the surface of the former will be to her weight only as 8 to 4. Therefore as the winds and waves act only upon the surface, the large vessel will by her weight resist their impetuosity much more than the small.

We

We find from history, that before the discovery of the mariner's compass, four attempts were made to sail round the coast of Africa. The Phœnicians sent by * Necho, and Eudoxus (a) flying from the wrath of Ptolemy-Lythus, set out from the Red Sea, and succeeded. Sataſpes (b) sent by Xerxes, and Hanno by the Carthaginians, set out from the Pillars of Hercules, and failed in the attempt.

The capital point in surrounding Africa was, to discover and double the Cape of Good Hope. Those who set out from the Red Sea found this cape nearer by half, than it would have been in setting out from the Mediterranean. The shore from the Red Sea is not so shallow, as that from the cape † to Hercules's Pillars. The discovery of the cape by Hercules's Pillars was owing to the invention of the compass, which permitted them to leave the coast of Africa, and to launch out || into the vast ocean, in order to sail towards the island of St Helena, or towards the coast of Brasil. It was therefore very possible for them to sail from the Red Sea into the Mediterranean, but not to set out from the Mediterranean to return by the Red Sea.

Thus, without making this grand circuit, after which they could hardly ever hope to return, it was most natural to trade to the east of Africa by the Red Sea, and to the western coast by Hercules's Pillars.

B 2

CHAP.

* He was desirous of conquering it. Herodotus, lib. 4.

† Add to this what I shall say in Chap. viii. of this book, on the navigation of Hanno.

|| In the months of October, November, December, and January, the wind in the Atlantic ocean is found to blow north-east; our ships therefore either cross the line, and to avoid the wind which is there generally at east, they direct their course to the south; or else they enter into the torrid zone, in those places where the wind is at west.

(a) Pliny, lib. ii. chap. 67. Pomponius Mela, lib. iii. chap. 9.

(b) Herodotus in Melpomene.

CHAP. VII.

Of the Commerce of the Greeks, and that of Egypt, after the Conquest of Alexander.

THE first Greeks were all pirates. Minos, who enjoyed the empire of the sea, was only more successful, perhaps, than others in piracy; for his maritime dominion extended no farther than round his own isle. But when the Greeks became a great people, the Athenians obtained the real dominion of the sea; because this trading and victorious nation gave laws to the most potent monarch (a) of that time, and humbled the maritime powers of Syria, of the isle of Cyprus, and Phœnicia.

But this Athenian lordship of the sea deserves to be more particularly mentioned. "Athens, says Xenophon (b), rules the sea; but as the country of Attica is joined to the continent, it is ravaged by enemies, while the Athenians are engaged in distant expeditions. Their leaders suffer their lands to be destroyed; and secure their wealth by sending it to some island. The populace, who are not possessed of lands, have no uneasiness. But if the Athenians inhabited an island, and besides this enjoyed the empire of the sea, they would, as long as they were possessed of these advantages, be able to annoy others, and at the same time be out of all danger of being annoyed." One would imagine that Xenophon was speaking of England.

The Athenians, a people whose heads were filled with ambitious projects; the Athenians, who augmented their jealousy, instead of increasing their influence; who were more attentive to extend their maritime empire than to enjoy it; whose political government was such that the common people distributed the public revenues amongst themselves, while the rich were in

(a) The King of Persia.

(b) On the Athenian Republic.

a state of oppression ; the Athenians, I say, did not carry on so extensive a commerce as might be expected from the produce of their mines, from the multitude of their slaves, from the number of their seamen, from their influence over the cities of Greece, and above all, from the excellent institutions of Solon. Their trade was almost wholly confined to Greece, and to the Euxine sea, from whence they drew their subsistence.

Corinth separated two seas, and opened and shut the Peloponnesus : it was the key of Greece, and a city, in fine, of the greatest importance, at a time when the people of Greece were a world, and the cities of Greece nations. Its trade was very extensive, having a port to receive the merchandises of Asia, and another those of Italy : for the great difficulties which attend the doubling Cape Malea, where the (a) meeting of opposite winds causes shipwrecks, induced every one to go to Corinth, and they could even convey their vessels over land from one sea to another. Never was there a city, in which the works of art were carried to so high a degree of perfection. But here religion finished the corruption which their opulence began. They erected a temple to Venus, in which more than a thousand courtesans were consecrated to that deity ; from this seminary came the greatest part of those celebrated beauties, whose history Athenæus has presumed to commit to writing.

Four great events happened in the reign of Alexander, which entirely changed the face of commerce ; the taking of Tyre, the conquest of Egypt, and likewise of the Indies, and the discovery of the sea which lies south of that country. The Greeks of Egypt found themselves in an excellent situation for carrying on a prodigious commerce ; they were masters of the ports of the Red Sea ; Tyre, the rival of all the trading nations, was no more ; they were not constrained by the ancient superstitions *

of

(a) See Strabo, lib. viii.

* Which inspired an aversion for strangers.

of the country ; and Egypt was become the center of the universe.

The empire of Persia extended to the Indus (b). Darius, long before Alexander, had sent (c) some vessels which failed down this river, and passed even into the Red Sea. How then were the Greeks the first who traded to the Indies by the south ? Had not the Persians done this before ? Did they make no advantage of seas which were so near them ; of the very seas that washed their coasts ? Alexander, it is true, conquered the Indies ; but was it necessary for him to conquer a country, in order to trade with it ? This is what I shall now examine.

Ariana (d), which extended from the Persian Gulf as far as the Indus, and from the South Sea to the mountains of Paropamisus, depended indeed in some measure on the empire of Persia : but in the southern part it was barren, scorched, rude, and uncultivated. Tradition (e) relates that the armies of Semiramis and Cyrus perished in these deserts ; and Alexander, who caused his fleet to follow him, could not avoid losing in this place a great part of his army. The Persians left the whole coast to the Ichthyophagi (f), the Oritæ, and other barbarous nations. Besides, the Persians were no † great sailors, and their very religion debarred them from entertaining any such notion as that of a maritime commerce. The voyage undertaken by Darius's direction upon the Indus and the Indian sea, proceeded rather from the capriciousness of a prince vainly ambitious of shewing his power, than from any settled regular project. It was attended with no consequence, either to the advantage of commerce, or of navigation. They emerged from their ignorance, only to plunge into it again.

Besides,

(b) Strabo, lib. xv.

(c) Herodotus in Melpomene.

(d) Strabo, lib. xv.

(e) Strabo lib. xv.

(f) Pliny, Lib. vi. Chap. 23. Strabo, Lib. xvi.

† They sailed not upon the rivers, lest they should defile the elements. Hyde's religion of the Persians. Even to this day they have no maritime commerce. Those who take to the sea, are treated by them as atheists.

Besides, it was a received opinion (a) before the expedition of Alexander, that the southern parts of India were uninhabitable *. This proceeded from a tradition that (b) Semiramis had brought back from thence only twenty men, and Cyrus but seven.

Alexander entered by the north. His design was to march towards the east: but having found a part of the south full of great nations, cities and rivers, he attempted to conquer it, and succeeded.

He then formed the design of uniting the Indies to the western nations by a maritime commerce, as he had already united them by the colonies he had established by land.

He ordered a fleet to be built on the Hydaspes, and then fell down that river, entered the Indus, and sailed even to its mouth. The fleet followed the coast from the Indus along the banks of the country of the Oritæ, of the Ichthyophagi, of Carmania and Persia. He built cities, and would not suffer the Ichthyophagi (c) to live on fish, being desirous of having the borders of the sea inhabited by civilized nations. Onesecritus and Nearchus wrote (d) a journal of this voyage, which was performed in ten months. They arrived at Susa, where they found Alexander, who gave an entertainment to his whole army. He had left the fleet at Patala *, to go thither by land.

This prince had founded Alexandria, with a view of securing his conquest of Egypt; this was a key to open it in the very place where the kings his † predecessors had a key to shut it; and he had not the least thought of a commerce, of which the discovery of the Indian sea could alone give him the idea.

The

(a) Strabo Lib. xv.

(b) Ibid.

* Herodotus (in Melpomene) says, that Darius conquered the Indies; this must be understood only to mean Ariana; and even this was only an ideal conquest.

(c) Pliny book vi. Chap. 23.

(d) Ibid.

* A city in the Island of Patalena, at the mouth of the Indus.

† Alexandria was founded on a flat shore, called Rhacotis, where in ancient times, the kings had kept a garrison, to prevent all strangers, and more particularly the Greeks, from entering the country. Pliny, Lib. v. Chap. 10. Strabo, Lib. xvii.

The Kings of Syria left the commerce of the south to those of Egypt, and attached themselves only to the northern trade, which was carried on by means of the Oxus and the Caspian sea. They then imagined that this sea was part of the (c) northern ocean. Seleucus and Antiochus applied themselves to make discoveries in it with a particular attention; and with this view they scoured it with their fleets (d). That part which Seleucus surveyed, was called the Seleucidian sea; that which Antiochus discovered, received the name of the sea of Antiochus. Attentive to the projects they might have formed of attacking Europe from hence on the back of Gaul and Germany, they neglected the seas on the south; whether it was that the Ptolemies, by means of their fleets on the Red Sea, were already become the masters of it; or that they had discovered an invincible aversion in the Persians against engaging in maritime affairs; or, in fine, that the general submission of all the people in the south left no room for them to flatter themselves with the hopes of further conquests.

I am surpris'd, I confess, at the obstinacy with which the ancients believed that the Caspian sea was a part of the ocean. The expeditions of Alexander, of the kings of Syria, of the Parthians and the Romans, could not make them change their sentiments; notwithstanding these nations described the Caspian sea with a wonderful exactness: but men are generally so tenacious of their errors, that they acquiesce to truth as late as possible. When only the south of this sea was known, it was at first taken for the ocean; in proportion as they advanced along the banks of the northern coast, instead of imagining it a great lake, they still believed it to be the ocean, that here made a sort of a bay; when they had almost finished its circuit, and had quite surveyed the northern coast, though their eyes were then opened,

(c) Pliny, Lib. vi. Chap. 12. and Strabo, Lib. 2. P. 507.

(d) Pliny, Lib. 2. Chap. 67.

opened, yet they shut them once more; and took the mouth of the Volga for a strait, or a prolongation of the ocean.

The land army of Alexander had been on the east only as far as the Hyphasis, which is the last of those rivers that fall into the Indus: thus the first trade which the Greeks carried on to the Indies was confined to a very small part of the country. Seleucus-Nicator penetrated as far as the Ganges (a), and by that means discovered the sea into which this river falls, that is to say, the Bay of Bengal. The moderns discover countries by voyages at sea; the ancients discovered seas by conquests at land.

Strabo (b), notwithstanding the testimony of Apollodorus, seems to doubt whether the Grecian * kings of Bactria proceeded farther than Seleucus and Alexander. I am apt to think they went no farther to the east, and that they did not pass the Ganges: but they went farther towards the south: they discovered (c) Siger, and the ports in Guzarat and Malabar, which gave rise to the navigation I am going to mention.

Pliny (d) informs us, that the navigation of the Indies was successively carried on by three different ways. At first they sailed from the cape of Siagre to the island of Patalena, which is at the mouth of the Indus. This we find was the course that Alexander's fleet steered to the Indies. They took afterwards (e) a shorter and more certain course, by sailing from the same cape or promontory to Siger: this can be no other but the kingdom of Siger, mentioned by Strabo (f), and discovered by the Grecian kings of Bactria. Pliny, by saying that this way was shorter than the other, can mean only that the voyage was made

VOL. II.

C

in

(a) Pliny, Lib. vi. Chap. 17.

(b) Lib. xv.

* The Macedonians of Bactria, India, and Ariana having separated themselves from Syria, formed a great state.

(c) Apollonius Adramatinus in Strabo, Lib. ii.

(d) Lib. vi. Chap. 23.

(e) Pliny, Lib. vi. Chap. 23.

(f) Lib. xi. Sigertidis regnum.

in less time: for as Siger was discovered by the kings of Bactria, it must have been farther than the Indus: by this passage they must therefore have avoided the winding of certain coasts, and taken advantage of particular winds. The merchants at last took a third way; they sailed to Canes, or Ocelis, ports situated at the entrance of the Red Sea; from whence, by a west wind, they arrived at Muziris, the first staple town of the Indies, and from thence to the other ports.

Here we see, that instead of sailing to the mouth of the Red Sea as far as Siagre, by coasting Arabia-Felix to the north-east, they steered directly from west to east, from one side to the other, by means of the trade winds, whose regular course they discovered by sailing in these latitudes. The ancients never lost sight of the coasts, but when they took advantage of these winds, which were to them a kind of compass.

Pliny (d) says, that they set sail for the Indies in the middle of summer, and returned towards the end of December, or in the beginning of January. This is entirely conformable to our naval journals. In that part of the Indian sea which is between the peninsula of Africa and that on this side the Ganges, there are two monsoons; the first, during which the winds blow from west to east, begins in the month of August or September; and the second, during which the wind is in the east, begins in January. Thus we set sail from Africa for Malabar, at the season of the year that Ptolemy's fleet used to set out from thence; and we return too at the same time as they.

Alexander's fleet was seven months in sailing from Patala to Sufa. It set out in the month of July, that is, at a season when no ship dare now put to sea to return from the Indies. Between these two monsoons there is an interval of time, during which the winds vary; when a north wind, meeting with the common winds, raises, especially near the coasts, the most terrible tempests. These continue during the months of June, July, and August. Alexander's fleet, therefore setting sail from Patala in the

(d) Lib. vi. Chap. 23.

the month of July, must have been exposed to many storms, and the voyage must have been long, because they sailed against the trade wind.

Pliny says that they set out for the Indies at the end of summer; thus they spent the time proper for taking advantage of the trade-wind, in their passage from Alexandria to the Red Sea.

Observe here, I pray, how navigation has by little and little arrived at perfection. Darius's fleet was two years and a half (a) in falling down the Indus, and going to the Red Sea. Afterwards the fleet of Alexander (b), descending the Indus, arrived at Susa in ten months, having sailed three months on the Indus, and seven on the Indian sea: at last the passage from the coast of Malabar to the Red Sea was made in forty days (c).

Strabo (d), who accounts for their ignorance of the countries between the Hyphasis and the Ganges, says, that there were very few of those who sailed from Egypt to the Indies, that ever proceeded so far as the Ganges. Their fleets, in fact, never went thither: they sailed with the western trade-winds from the mouth of the Red Sea to the coast of Malabar. They cast anchor in the ports along that coast, and never attempted to get round the peninsula on this side the Ganges by Cape Comorin and the coast of Coromandel. The plan of navigation laid down by the kings of Egypt and the Romans was, to set out and return the same year (e).

Thus it is demonstrable, that the commerce of the Greeks and Romans to the Indies was much less extensive than ours. We know immense countries which to them were entirely unknown; we traffic with all the Indian nations; we even manage their trade, and in our bottoms carry on their commerce.

But this commerce of the antients was carried on with far greater facility than ours. And if the moderns were to trade

C 2

only

(a) Herodotus in Melpomene.

(b) Pliny. Lib. vi. Chap. 23.

(c) Pliny, Lib. vi. Chap. 23.

(c) Ibid.

(d) Lib. xv.

only to the coasts of Guzarat and Malabar, and, without seeking for the southern isles, were satisfied with what these islanders brought them, they would certainly prefer the way of Egypt to that of the Cape of Good Hope. Strabo (b) informs us, that they traded thus with the people of Taprobane.

I shall finish this chapter with a reflection. Ptolemy the (c) geographer extends the eastern part of known Africa to Cape Prassum, and Arrian (d) bounds it by Cape Raptum. Our best maps place Cape Prassum at Mosambique, in 14 degrees and a half south latitude, and Cape Raptum, at about 10 degrees of the same latitude. But as the country extended from the kingdom of Anian (a kingdom that indeed produces no merchandise), becomes richer in proportion as it stretches towards the south, as far as the country of Sofala, where lies the source of riches; it appears at first view astonishing, that they should have thus retrograded towards the north, instead of advancing to the south.

In proportion as their knowledge increased, navigation and trade deserted the coast of Africa for that of India. A rich and easy commerce made them neglect one less lucrative, and more full of difficulties. The eastern coast of Africa was less known than in the time of Solomon; and though Ptolemy speaks of Cape Prassum, it is rather as of a place that had been formerly known than of one known at that time. Arrian* bounds the known country at Cape Raptum, because at that time they went no farther. And though † Marcian of Heraclea extends it to Cape Prassum, his authority is of no weight: for he himself confesses ‡ that he copies from Artemidorus, and Artemidorus from Ptolemy.

CHAP.

(b) Lib. xv.

(c) Lib. 4. Ch. 7. and Lib. 8.

(d) See the Periple of the Erythrean sea.

* Ptolemy and Arrian were nearly contemporaries.

† His work is to be found in a collection of the small pieces of the Grecian geographers, printed at Oxford in 1698. Vol. I. pag. 10.

‡ Ibid. 1. 2.

CHAP. VIII.

Of CARTHAGE and MARSEILLES.

CARTHAGE increased her power by her riches, and afterwards her riches by her power. Being mistress of the coasts of Africa, which are washed by the Mediterranean, she extended herself along the ocean. Hanno, by order of the senate of Carthage, distributed thirty thousand Carthaginians from Hercules's Pillars as far as Cerne. This place, he says, is as far from Hercules's Pillars as the latter is from Carthage. This situation is extremely remarkable. It lets us see, that Hanno limited his settlements to the 25th degree of north latitude, that is, to two or three degrees south of the Canaries.

Hanno being at Cerne undertook another voyage, with a view of making further discoveries towards the south. He took but little notice of the continent. He followed the coast for twenty-six days, when he was obliged to return for want of provisions. The Carthaginians, it seems, made no use of this second enterprize. Scylax (a) says, that the sea is not (b) navigable beyond Cerne, because it is shallow, full of mud and seaweeds: and, in fact, there are many of these in those § latitudes. The Carthaginian merchants mentioned by Scylax might find obstacles, which Hanno, who had sixty vessels of fifty oars each, had surmounted. Difficulties are at most but relative; besides, we ought not to confound an enterprize, in which bravery and resolution must be exerted, with things that require no extraordinary conduct.

The

(a) See his Periplus, under the article of Carthage.

(b) See Herodotus in Melpomene on the obstacles which Sataſpe encountered.

§ See the charts and narrations in the first volume of Voyages that contributed to the establishment of an East India Company, Part I. page 201. This weed covers the surface of the sea in such a manner that it can scarcely be perceived, and vessels can only pass through it with a stiff gale.

The relation of Hanno's voyage is a fine fragment of antiquity. It was written by the very man that performed it. His recital is not mingled with ostentation. Great commanders write their actions with simplicity; because they receive more glory from facts than from words. The style is agreeable to the subject: He deals not in the marvellous. All he says of the climate, of the soil, the behaviour, the manners of the inhabitants, correspond with what is every day seen on this coast of Africa; one would imagine it the journal of a modern sailor.

He observed from his fleet, that in the day-time there was a prodigious silence on the continent, that in the night he heard the sound of various musical instruments, and that fires might then be every-where seen, some larger than others. Our relations are conformable to this; it has been discovered, that in the day the savages retire into the forests to avoid the heat of the sun, that they light up great fires in the night to disperse the beasts of prey, and that they are passionately fond of music and dancing.

The same writer describes a volcano with all the phenomena of Vesuvius; and relates, that he took two hairy women, who chose to die rather than follow the Carthaginians, and whose skins he carried to Carthage. This has been found not void of probability.

This narration is so much the more valuable as it is a monument of Punic antiquity; and from hence alone it has been regarded as fabulous. For the Romans retained their hatred to the Carthaginians, even after they had destroyed them. But it was victory alone that decided whether we ought to say, *The Punic* or *the Roman faith*.

Some moderns * have imbibed these prejudices. What is become, say they, of the cities described by Hanno, of which even in Pliny's time there remained no vestiges? But it would have been a wonder indeed, if any such vestiges had remained.

Was

* Mr Dodwell, See his Dissertation on Hanno's Periplus,

Was it a Corinth or an Athens that Hanno built on these coasts? He left Carthaginian families in such places as were most commodious for trade, and secured them as well as his hurry could permit, against savages and wild beasts. The calamities of the Carthaginians put a period to the navigation of Africa; these families must necessarily then either perish or become savages. Besides, were the ruins of these cities even still in being, who is it that would venture into the woods and marshes to make the discovery? We find, however, in Scylax and Polybius, that the Carthaginians had considerable settlements on these coasts. These are the vestiges of the cities of Hanno; there are no other, from the same reason that there are no other of Carthage itself.

The Carthaginians were in the high road to wealth; and had they gone so far as four degrees of north latitude, and fifteen of longitude, they would have discovered the gold coast. They would then have had a trade of much greater importance than that which is carried on at present on that coast, at a time when America seems to have degraded the riches of all other countries. They would there have found treasures, of which they could never have been deprived by the Romans.

Very surprising things have been said of the riches of Spain. If we may believe Aristotle (a), the Phœnicians, who arrived at Tartessus, found so much silver there, that their ships could not hold it all; and they made of this metal their meanest utensils. The Carthaginians, according to Diodorus (b), found so much gold and silver in the Pyrenean mountains, that they adorned the anchors of their ships with it. But no foundation can be built on such popular reports. Let us therefore examine into the facts themselves.

We find in a fragment of Polybius cited by Strabo (c), that the silver mines at the source of the river Bætis, in which forty thousand men were employed, produced to the Romans twenty-five

(a) Of wonderful things.

(b) Lib. vi.

(c) Lib. iii.

five thousand drachmas a day, that is, about five millions of livres a-year, at fifty livres to the mark. The mountains that contained these mines were called the (d) *Silver Mountains*: which shews they were the Potosi of those times. At present the mines of Hanover do not employ a fourth part of the workmen, and yet they yield more. But as the Romans had not many copper mines, and but few of silver; and as the Greeks knew none but the Attic mines, which were of little value, they might well be astonished at their abundance.

In the war that broke out for the succession of Spain, a man called the marquis of Rhodes, of whom it was said that he was ruined in golden mines, and enriched in hospitals *, proposed to the Court of France to open the Pyrenean mines. He alledged the example of the Tyrians, the Carthaginians, and the Romans. He was permitted to search, but sought in vain; he still alledged, and found nothing.

The Carthaginians being masters of the gold and silver trade, were willing to be so of the lead and pewter. These metals were carried by land from the ports of Gaul upon the ocean to those of the Mediterranean. The Carthaginians were desirous of receiving them at the first hand; they sent Himilco † to make a settlement (e) in the isles called Cassiterides, which are imagined to be those of Scilly.

These voyages from Bætica into England have made some persons imagine that the Carthaginians knew the compass: but it is very certain that they followed the coasts. There needs no other proof than Himilco's being four months in sailing from the mouth of the Bætis to England: besides the famous piece of history of the Carthaginian (f) pilot, who being followed

(d) Mons Argentarius.

* He had some share in their management.

† It appears from Pliny, that this Himilco was sent at the same time with Hanno; as in the time of Agathocles there were a Hanno and an Himilco both chiefs of the Carthaginians. Mr Dodwell conjectures that these were the same, more especially as the republic was then in its flourishing state. See his Dissertation on Hanno's Periplus.

(e) See Festus Avienus.

(f) Strabo, Lib. iii. towards the end.

ed by a Roman vessel, ran a-ground that he might not † shew her the way to England, plainly intimates that those vessels were very near the shore when they fell in with each other.

The ancients might have performed voyages, that would make one imagine they had the compass, though they had not. If a pilot was far from land, and during his voyage had such serene weather, that in the night he could always see a polar star, and in the day the rising and setting of the sun, it is certain he might regulate his course as well as we do now by the compass: but this must be a fortuitous case, and not a regular method of navigation.

We see in the treaty which put an end to the first Punic war, that Carthage was principally attentive to preserve the empire of the sea, and Rome that of the land. Hanno (a), in his negotiation with the Romans, declared that they should not be suffered even to wash their hands in the sea of Sicily; they were not permitted to sail beyond the *promontorium pulchrum*; they were forbid to trade in Sicily *, Sardinia, and Africa, except at Carthage: an exception that lets us see there was no design to favour them in their trade with that city.

In the early times there had been very great wars between Carthage and Marseilles ‡ on the subject of fishing. After the peace they entered jointly into the æconomical commerce. Marseilles at length grew jealous, especially as being equal to her rival in industry, she was become inferior to her in power. This is the motive of her great fidelity to the Romans. The war between the latter and the Carthaginians in Spain was a source of riches to Marseilles, which was now become their magazine. The ruin of Carthage and Corinth still increased the

VOL. II.

D

glory

† He was rewarded by the senate of Carthage.

(a) Frenshemius's Supplement to Livy, 2d Decad. Lib. vi.

* In the parts subject to the Carthaginians.

‡ Carthaginiensium quoque exercitus, cum bellum captis piscatorum navibus ortum esset, sæpe fuderunt, pacemque vicis dederunt. Justin, lib. xliii, cap. 5.

glory of Marseilles ; and had it not been for the civil wars, in which this republic ought on no account to have engaged, she would have been happy under the protection of the Romans, who had not the least jealousy of her commerce.

CHAP. IX.

Of the Genius of the ROMANS as to Maritime Affairs.

THE Romans laid no stress on any thing but their land forces, who were disciplined to stand always firm, to fight on one spot, and there bravely to die. They could not like the practice of seamen, who first offer to fight, then flee, then return, constantly avoid danger, often make use of stratagems, and seldom of force. This was not suitable to the genius of the * Greeks, much less to that of the Romans.

They destined therefore to the sea only those citizens who were not (a) considerable enough to have a place in their legions. Their marines were commonly freed-men.

At this time we have neither the same esteem for land-forces, nor the same contempt for those of the sea. In the first, (b) art is decreased ; in the (c) second, it is augmented : now things are generally esteemed in proportion to the degree of ability requisite to discharge them.

CHAP. X.

Of the Genius of the ROMANS with respect to Commerce.

THE Romans were never distinguished by a jealousy for trade. They attacked Carthage as a rival, not as a trading nation. They

* As Plato has observed, lib. iv. of laws.

(a) Polybius, lib. iv.

(b) See the considerations on the causes of the rise and declension of the Roman grandeur.

(c) Ibid,

They favoured trading cities, though they were not subject to them. Thus they increased the power of Marfeilles by the cession of a large territory. They were vastly afraid of barbarians; but had not the least apprehension from a trading people. Their genius, their glory, their military education, and the very form of their government, estranged them from commerce.

In the city they were employed only about war, elections, factions, and law-suits; in the country, about agriculture; and, as for the provinces, a severe and tyrannical government was incompatible with commerce.

But their political constitution was not more opposite to trade than their law of nations. "The people, says (a) Pomponius the civilian, with whom we have neither friendship nor hospitality, nor alliance, are not our enemies; however, if any thing belonging to us falls into their hands, they are the proprietors of it; freemen become their slaves; and they are upon the same terms with respect to us."

Their civil law was not less oppressive. The law of Constantine, after having stigmatised as bastards the children of persons of a mean rank, who had been married to those of a superior station, confounds women who keep a * shop for vending merchandizes, with slaves, with women who keep taverns, with actresses, with the daughters of those who keep public stews, or who had been condemned to fight in the amphitheatre: This had its original in the antient institutions of the Romans.

I am not ignorant that men prepossessed with these two ideas, that commerce is of the greatest service to a state, and that the Romans had the best regulated government in the world, have believed that they greatly honoured and encouraged commerce; but the truth is, they seldom troubled their heads about it.

(a) Leg. 5. ff. de Captivis.

* Quæ mercimoniis publice præfuit. Leg. 5. cod. de natural. Liberis.

CHAP. XI.

Of the Commerce of the ROMANS with the Barbarians.

THE Romans having erected Europe, Asia, and Africa into one vast empire, the weakness of the people and the tyranny of their laws united all the parts of this immense body. The Roman policy was then to avoid all communication with those nations whom they had not subdued : the fear of carrying to them the art of conquering, made them neglect the art of enriching themselves. They made laws to hinder all commerce with barbarians. " Let nobody, said (z) Valens and Gracian, " send wine, oil or other liquors to the barbarians, though it " be only for them to taste. Let no one carry gold to them (a), " adds Gratian, Valentinian, and Theodosius ; rather, if they " have any, let our subjects deprive them of it by stratagem." The exportation of iron (b) was prohibited on pain of death.

Domitian, a Prince of great timidity, ordered the (c) vines in Gaul to be pulled up ; from a fear, no doubt, lest their wines should draw thither the barbarians. Probus and Julian, who had no such fears, gave orders for their being planted again.

I am sensible that upon the declension of the Roman empire, the barbarians obliged the Romans to establish staple-towns (d), and to trade with them. But even this is a proof that the minds of the Romans were averse from commerce.

CHAP.

(z) Leg. ad barbaricum cod. quæ res exportari non debeant.

(a) Leg. 2. cod. de commerc. & mercator.

(b) Leg. 2. quæ res exportari non debeant, and Procopius's war of the Persians, Book I.

(c) See the Chronicles of Eutebius and Cedrenus.

(d) See the Considerations on the causes of the rise and declension of the Roman grandeur.

CHAP. XII.

Of the Commerce of the ROMANS with ARABIA and the INDIES.

THE trade to Arabia-Felix, and that to the Indies, were the two branches, and almost the only ones of their foreign commerce. The Arabs were formerly what they are at this day, equally addicted to trade and robbery. Their immense deserts on the one hand, and the riches which strangers went thither in search of, produced these two effects. These riches the Arabs found in their seas and forests; and as they sold much and purchased little, they drew to (e) themselves the gold and silver of the Romans. The Europeans trade with them still in the same manner; the caravans of Aleppo, and the royal vessel of Suez, carry thither immense sums*.

Their commerce to the Indies was very considerable. Strabo (f) had been informed in Egypt, that they employed in this navigation one hundred and twenty vessels: this commerce was carried on entirely with bullion. They sent thither annually fifty millions of sesterces. Pliny (g) says, that the merchandises brought from thence were sold at Rome at *cent. per cent.* profit. He speaks, I believe, too generally; if this trade had been so vastly profitable, every body would have been willing to engage in it, and then it would be at an end.

It will admit of a question, whether the trade to Arabia and the Indies was of any advantage to the Romans? They were obliged to export their bullion thither, though they had not, like

(e) Pliny, Lib. 6. Chap. 28.

* The caravans of Aleppo and Suez carry thither annually to the value of about two millions of livres, and as much more clandestinely; the royal vessel of Suez carries thither also two millions.

(f) Lib. 2. p. 81. of the edition printed in 1587.

(g) Lib. 6. Chap. 23.

like us, the resource of America, which supplies what we send away. I am persuaded that one of the reasons of their encreasing the value of their specie by establishing base coin, was the scarcity of silver, owing to the continual exportation of it to the Indies: and though the commodities of this country were sold at Rome at the rate of *cent. per cent.* this profit of the Romans, being obtained from the Romans themselves, could not enrich the empire.

It may be alledged, on the other hand, that this commerce increased the Roman navigation, and of course their power; that new merchandises augmented their inland trade, gave encouragement to the arts, and employment to the industrious; that the number of subjects multiplied in proportion to the new means of support; that this new commerce was productive of luxury, which I have proved to be as favourable to a monarchical government, as fatal to a commonwealth; that this establishment was of the same date as the fall of their republic; that the luxury of Rome was become necessary; and that it was extremely proper, that a city which had accumulated all the wealth of the universe should refund it by its luxury.

We shall say but one word on their inland trade. Its principal branch was the corn brought to Rome for the subsistence of the people: but this was rather a political affair than a point of commerce. On this account the sailors were favoured with some privileges (h), because the safety of the empire depended on their vigilance.

CHAP. XIII.

Of Commerce after the Destruction of the Western Empire.

COMMERCE was yet more undervalued after the invasion of the Roman empire. The barbarous nations at first regarded

(h) Suet. in Claudio, Leg. 7. cod. Theodof. de Naviculariis,

ed it only as an opportunity for robbery ; and when they had subdued the Romans, they honoured it no more than agriculture, and other professions of a conquered people.

Soon was the commerce of Europe almost intirely lost. The nobility, who had every where the direction of affairs, were in no pain about it.

The laws of the (a) Visigoths permitted private people to occupy half the beds of great rivers, provided the other half remained free for nets and boats. There must have been very little trade in countries conquered by those barbarians.

In those times were established the ridiculous rights of escheatage and shipwrecks. These men thought that strangers not being united to them by any civil law, they owed them on the one hand no kind of justice, and on the other no sort of pity.

In the narrow bounds which nature had originally prescribed to the people of the north, all were strangers to them ; and in their poverty they regarded all only as contributing to their riches. Being established, before their conquests, on the coasts of a sea of very little breadth and full of rocks, from these very rocks they drew their subsistence.

But the Romans, who made laws for all the universe, had established the most (b) humane ones with regard to shipwrecks. They suppressed the rapine of those who inhabited the coasts ; and what was still more, the rapaciousness of their treasuries (c).

CHAP. XIV.

A particular Regulation.

THE (d) law of the Visigoths made however one regulation in favour of commerce. It ordained, that foreign merchants

(a) Lib. 8. tit. 4. §. 9.

(b) Toto titulo ff. de incend. ruin. & naufrag. & cod. naufragiis, & leg. 3. ff. ad leg. Cornel. de sicariis.

(c) Leg. 1. cod. de Naufragiis,

(d) Lib. ii. Tit. 3. §. 2.

chants should be judged, in the differences that arose amongst themselves, by the laws and by judges of their own nation. This was founded on an established custom among all these mixed people, that every man should live under his own law : A custom of which I shall speak more at large in another place.

CHAP. XV.

Of Commerce after the decay of the Roman Power in the East.

THE Mahometans appeared, conquered, extended, and dispersed themselves. Egypt had particular sovereigns ; these carried on the commerce of India, and being possessed of the merchandises of this country, drew to themselves the riches of all other nations. The Sultans of Egypt were the most powerful princes of those times. History informs us with what a constant and well regulated force they stopped the ardor, the fire, and the impetuosity of the Crusades.

CHAP. XVI.

How Commerce broke through the Barbarism of Europe.

ARISTOTLE's philosophy being carried to the west, pleased the subtle geniuses, who were the virtuosi of those times of ignorance. The schoolmen were infatuated with it, and derived from hence (b) their doctrine of lending upon interest ; this they confounded with usury, and condemned. Hence commerce, which was the profession only of mean persons, became that of knaves : for whenever a thing is forbidden, which nature permits or necessity requires, it is only making those who do it dishonest.

Commerce

(b) See Aristot. polit. lib. i. chap. 9. and 10.

Commerce was transferred to a nation covered with infamy ; and was soon ranked with the most shameful usury, with monopolies, with the levying of subsidies, and with all the dishonest means of acquiring wealth.

The Jews *, enriched by their exactions, were pillaged by the tyranny of princes ; which pleased indeed, but did not ease the people.

What passed in England may serve to give us an idea of what was done in other countries. King John (a) having imprisoned the Jews, in order to obtain their wealth ; there were few who had not at least one of their eyes plucked out. Thus did that King influence his court of justice. A certain Jew who had a tooth pulled out every day for seven days successively, gave ten thousand marks of silver for the eighth. Henry III. extorted from Aaron, a Jew at York, fourteen thousand marks of silver, and ten thousand for the Queen. In those times they did by violence, what is now done in Poland with some semblance of moderation. As princes could not dive into the purses of their subjects because of their privileges, they put the Jews to the torture, who were not considered as citizens.

At last a custom was introduced of confiscating the effects of those Jews who embraced christianity. This ridiculous custom is known only by the law (b) which suppressed it. The most vain and trifling reasons were given in justification of that proceeding ; it was alledged, that it was proper to try them, in order to be certain that they had entirely shook off the slavery of the devil. But it is evident, that this confiscation was a

VOL. II.

E

species

* See in *Marca Hispanica* the constitutions of Arragon in the years 1228 and 1353 ; and in Bruffel, the agreement, in the year 1206, between the King, the Countess of Champagne, and Guy of Dampierre.

(a) Stowe's Survey of London, book iii. p. 54.

(b) The Edict passed at Baviile, April 4. 1392.

species of the right of † amortisation, to recompense the prince, or the lords, for the taxes levied on the Jews, which ceased on their embracing christianity. In those times men, like lands, were regarded as property. I cannot help remarking by the way how this nation has been sported with from one age to another: at one time, their effects were confiscated when they were willing to become christians; and at another, if they refused to turn christians, they were ordered to be burnt.

In the mean time, commerce was seen to arise from the bosom of vexation and despair. The Jews, proscribed by turns from every country, found out the way of saving their effects. By this means they rendered their retreats for ever fixed; for though princes might have been willing to get rid of their persons, yet they did not chuse to get rid of their money.

The * Jews invented letters of exchange; commerce, by this means, became capable of eluding violence, and of maintaining every where its ground; the richest merchant having none but invifible effects, which he could convey imperceptibly wherever he pleased.

The theologians were obliged to limit their principles: and commerce, which they had before connected by main force with knavery, re-entered, if I may so express myself, the bosom of probity.

Thus we owe to the speculations of the schoolmen all the misfortunes which accompanied the destruction of commerce; and to the avarice of princes, the establishment of a practice which puts it in some measure out of their power.

From

† In France the Jews were slaves in mortmain, and the lords their successors. Mr Brussel mentions an agreement made in the year 1206, between the King and Thibaut count of Champagne, by which it was agreed that the Jews of the one should not lend in the lands of the other.

* It is known that under Philip Augustus and Philip the Long, the Jews who were chased from France took refuge in Lombardy, and that there they gave to foreign merchants and travellers, secret letters drawn upon those to whom they had intrusted their effects in France, which were accepted.

From this time it became necessary, that princes should govern with more prudence than they themselves could ever have imagined: for great exertions of authority were, in the event, found to be impolitic; and from experience it is manifest, that nothing but the goodness and lenity of a government can make it flourish.

We begin to be cured of Machiavelism, and recover from it every day. More moderation is become necessary in the councils of princes. What would formerly have been called a master-stroke in politics, would be now, independent of the horror it might occasion, the greatest imprudence.

Happy is it for men that they are in a situation, in which, though their passions prompt them to be wicked, it is however for their interest to be humane and virtuous.

CHAP. XVII.

The Discovery of two new Worlds, and in what manner Europe is affected by it.

THE compass opened, if I may so express myself, the universe. Asia and Africa were found, of which only some borders were known; and America, of which we knew nothing.

The Portuguese, sailing on the Atlantic ocean, discovered the most southern point of Africa: they saw a vast sea, which carried them to the East Indies. Their dangers upon this sea, the discovery of Mozambique, Melinda, and Calicut, have been sung by Camoens, whose poems make us feel something of the charms of the Odyssey, and the magnificence of the Æneid.

The Venetians had hitherto carried on the trade of the Indies through the Turkish dominions, and pursued it in the midst of oppressions and discouragements. By the discovery of the Cape of Good Hope, and those which were made some time after, Italy was no longer the center of the trading world; it was, if I may be permitted the expression, only a corner of the uni-

verfe, and is fo ftill. The commerce even of the Levant depending now on that of the great trading nations to both the Indies, Italy can be no more than an acceffory.

The Portuguefe traded to the Indies in right of conquest. The (a) conftaining laws, which the Dutch at prefent impofe on the commerce of the little Indian Princes, had been eftablifhed before by the Portuguefe.

The fortune of the houfe of Austria was prodigious. Charles V. fucceeded to the poffeffion of Burgundy, Caftile, and Arragon; he arrived afterwards at the imperial dignity; and to procure him a new kind of grandeur, the univerfe extended itfelf, and there was feen a new world paying him obeifance.

Christopher Columbus difcovered America; and though Spain fent thither only a force fo fmall that the leaft prince in Europe could have fent the fame; yet it fubdued two vaft empires, and other great ftates.

While the Spaniards difcovered and conquered the weft, the Portuguefe pushed their conquests and discoveries in the eaft. Thefe two nations met each other; they had recourfe to Pope Alexander VI. who made the celebrated line of partition, and adjudged the great procefs.

But the other nations of Europe would not fuffer them quietly to enjoy their fhares. The Dutch chafed the Portuguefe from almoft all their fettlements in the Eaft-Indies; and feveral other nations planted colonies in America.

The Spaniards confidered thefe new-difcovered countries as the fubject of conquest; while others, more refined in their views, found them to be the proper fubjects of commerce, and upon this principle directed their proceedings. Hence feveral nations have conducted themfelves with fo much wifdom, that they have given a kind of fovereignty to companies of merchants, who governing thefe far diftant countries only with a view

(a) See the relation of Fr. Pirard, Part. 2. chap. 15.

view to trade, have made a great accessory power, without embarrassing the principal state.

The colonies they have formed are under a kind of dependence, of which there is scarcely an instance in all the colonies of the ancients; whether we consider them as holding of the state itself, or of some trading company established in the state.

The design of these colonies is to trade on more advantageous conditions than could otherwise be done with the neighbouring people, with whom all advantages are reciprocal. It has been established, that the * *metropolis*, or mother country, alone shall trade in the colonies, and that from very good reason: because the design of the settlement was the extension of commerce, not the foundation of a city, or of a new empire.

Thus it is still a fundamental law of Europe, that all commerce with a foreign colony shall be regarded as a mere monopoly, punishable by the laws of the country; and in this case we are not to be directed by the laws and precedents of the † ancients, which are not at all applicable.

It is likewise acknowledged, that a commerce established between the mother countries does not include a permission to trade in the colonies; for these always continue in a state of prohibition.

The disadvantage of a colony that loses the liberty of commerce, is visibly compensated by the protection of the mother country, who defends it by her arms, or supports it by her laws.

From hence follows a third law of Europe, that when a foreign commerce with a colony is prohibited, it is not lawful to trade in those seas, except in such cases as are excepted by treaty.

Nations who are, with respect to the whole universe, what individuals are in a state, like these are governed by the law of nature, and by particular laws of their own making. One nation may resign to another the sea, as well as the land. The Carthaginians

* This, in the language of the ancients, is the state which founded the colony.

† Except the Carthaginians, as we see by the treaty which put an end to the first Punic war.

thaginians forbad (a) the Romans to sail beyond certain limits, as the Greeks had obliged the king of Persia to keep as far distant from the sea-coast * as a horse could gallop.

The great distance of our colonies is not an inconvenience that affects their safety ; for if the mother country, on whom they depend for their defence, is far distant, no less distant are those nations by whom they may be afraid of being conquered.

Besides, this distance is the cause that those who are established there cannot conform to the manner of living in a climate so different from their own ; they are obliged therefore to draw from the mother country all the conveniencies of life. The (a) Carthaginians, to render the Sardinians and Corficans more dependent, forbad their planting, sowing, or doing any thing of the like kind under pain of death ; so that they supplied them with necessaries from Africa. The Europeans have compassed the same thing, without having recourse to such severe laws. Our colonies in the Carribee Islands are under an admirable regulation in this respect ; the subject of their commerce is what we neither have, nor can produce ; and they want what is the subject of ours.

A consequence of the discovery of America was the connecting Asia and Africa with Europe ; it furnished materials for a trade with that vast part of Asia, known by the name of the East Indies. Silver, that metal so useful as the medium of commerce, became now as a merchandise, the basis of the greatest commerce in the world. In fine, the navigation to Africa became necessary, in order to furnish us with men to labour in mines, and to cultivate the lands of America.

Europe is arrived to so high a degree of power, that nothing in history can be compared to it ; whether we consider the immensity of its expences, the grandeur of its engagements, the

(a) Polybius Lib. 3.

* The king of Persia obliged himself by treaty, not to sail with any vessel of war beyond the Ciane Rocks, and the Chelidonean isles. Plutarch in the life of Cimon.

(a) Aristotle on wonderful things, Lib. 7. Dec. 2.

number of its troops, and the regular payment even of those that are least serviceable, and which are kept only for ostentation.

Father Du Halde says (b), that the interior trade of China is much greater than that of all Europe. That might be, if our foreign trade did not augment our inland commerce. Europe carries on the trade and navigation of the other three parts of the world; as France, England, and Holland, do nearly that of Europe.

CHAP. XVIII.

Of the Riches which SPAIN drew from AMERICA.

IF Europe * has derived so many advantages from the American trade, it seems natural to imagine, that Spain must have derived much greater. She drew from the newly-discovered world so prodigious a quantity of gold and silver, that all we had before could not be compared to it.

But (what one could never have expected) this great kingdom was every where baffled by its misfortunes. Philip II. who succeeded Charles V. was obliged to make the celebrated bankruptcy known to all the world. There never was a prince who suffered more from the murmurs, the insolence, and the revolt of troops constantly ill paid.

From this time the monarchy of Spain has been incessantly declining. This has been owing to an interior and physical defect in the nature of these riches, which renders them vain; a defect which increases every day.

Gold and silver are either a fictitious, or a representative wealth. The representative signs of wealth are extremely durable, and, in their own nature, but little subject to decay.

But

(b) Tome 2. p. 170.

* This has been already shewn in a small treatise, written by the author about twenty years ago; which has been almost entirely incorporated in the present work.

But the more they are multiplied, the more they lose their value, because the fewer are the things which they represent.

The Spaniards, after the conquest of Mexico and Peru, abandoned their natural riches, in pursuit of a representative wealth which daily degraded itself. Gold and silver were extremely scarce in Europe; and Spain becoming all of a sudden mistress of a prodigious quantity of these metals, conceived hopes to which she never before aspired. The wealth she found in the conquered countries, great as it was, did not however equal that of their mines. The Indians concealed part of them; and besides, these people, who made no other use of gold and silver than to give magnificence to the temples of their gods, and to the palaces of their kings, fought not for it with an avarice like ours. In short, they had not the secret of drawing these metals from every mine, but only from those in which the separation might be made with fire: They were strangers to the manner of making use of mercury, and perhaps to mercury itself.

However, it was not long before the specie of Europe was doubled; this appeared from the price of commodities, which every where was doubled.

The Spaniards raked into the mines, scooped out mountains, invented machines to draw out water, to break the ore and separate it; and, as they sported with the lives of the Indians, they forced them to labour without mercy. As the specie of Europe soon doubled, the profit of Spain diminished in the same proportion, and they had every year but the same quantity of a metal, which was become by one half less precious.

In double the time the specie still doubled, and the profit still diminished another half.

It diminished even more than half: let us see in what manner.

To extract the gold from the mines, to give it the requisite preparations, and to import it into Europe, must be attended with some certain expence; I will suppose this to be as 1 to 64. When the specie was once doubled, and consequently became
by

By one half less precious, the expence was as 2 to 64. Thus the galleons which brought to Spain the same quantity of gold, brought a thing which really was of less value by one half, though the expences attending it had been one half higher.

If we proceed doubling and doubling, we shall find in this progression the cause of the impotency of the wealth of Spain. It is about two hundred years since they have begun to work their Indian mines. I suppose the quantity of specie at present in the trading world is to that before the discovery of the Indies as 32 is to 1; that is, it has been doubled five times: In two hundred years more the same quantity will be to that before the discovery as 64 is to one; that is, it will be doubled once more. Now at present, fifty (a) quintals of ore yield four, five, and six ounces of gold, and when it yields only two, the miner receives no more from it than his expences. In two hundred years, if it yields only four, this too will only defray his charges. There will then be but little profit to be drawn from the gold mines. The same reasoning will hold good of silver, except that the working of the silver mines is a little more advantageous than those of gold.

But, if mines should be discovered so fruitful as to give a much greater profit, the more fruitful they will be, the sooner the profit will cease.

The Portuguese in Brasil have found mines of gold so rich, that they must necessarily very soon make a considerable diminution in the profits of those of Spain, as well as in their own.

I have frequently heard people deplore the blindness of the Court of France, who repulsed Christopher Columbus, when he made the proposal of discovering the Indies. Indeed they did, though perhaps without design, an act of the greatest wisdom.

Spain has behaved like the foolish king, who desired that every thing he touched might be converted into gold, and who was obliged to beg of the Gods to put an end to his misery.

VOL. II.

F.

The

(a) See Frezier's Voyages.

The companies and banks established in many nations, have put a finishing stroke to the lowering of gold and silver, as a sign or representation of riches; for by new fictions they have multiplied in such a manner the signs of wealth, that gold and silver having this office only in part, are become less precious.

Thus public credit serves instead of mines, and diminishes the profit which the Spaniards draw from theirs.

True it is, that the Dutch trade to the East-Indies has increased, in some measure, the value of the Spanish merchandize; for, as they carry bullion, and give it in exchange for the merchandizes of the east, they ease the Spaniards of part of a commodity, which in Europe abounds too much.

And this trade, which may indirectly be regarded as that of Spain, is as advantageous to that nation, as to those who are directly employed in carrying it on.

From what has been said, we may form a judgment of the last order of the council of Spain, which prohibits the making use of gold and silver in gildings and other superfluities: a decree as ridiculous as it would be for the states of Holland to prohibit the consumption of spices.

My reasoning does not hold good against all mines; those of Germany and Hungary, which produce little more than the expence of working them, are extremely useful. They are found in the principal state; they employ many thousand men, who there consume their superfluous commodities; and they are properly a manufacture of the country.

The mines of Germany and Hungary promote the culture of land; the working of those of Mexico and Peru destroys it.

The Indies and Spain are two powers under the same master; but the Indies are the principal, while Spain is only an accessory. It is in vain for politics to attempt to bring back the principal to the accessory; the Indies will always draw Spain to themselves.

Of the merchandizes to the value of about fifty millions of livres annually sent to the Indies, Spain furnishes only two millions

millions and a half: the Indies trade for fifty millions, the Spaniards for two and a half.

That must be a bad kind of riches which depends on accident, and not on the industry of a nation, on the number of its inhabitants, and on the cultivation of its lands. The King of Spain, who receives great sums from his custom-house at Cadiz, is in this respect only a rich individual in a state extremely poor. Every thing passes between strangers and himself, while his subjects have scarcely any share in it: this commerce is independent both of the good and bad fortune of his kingdom.

Were some provinces of Castile able to give him a sum equal to that of the custom-house of Cadiz, his power would be much greater: his riches would be the effect of the wealth of the country: these provinces would animate all the others, and they would be altogether more capable of supporting their respective charges: instead of a great treasury, he would have a great people.

CHAP. XIX.

A Problem.

IT is not for me to decide the question, whether if Spain be not herself able to carry on the trade of the Indies, it would not be better to leave it open to strangers. I will only say, that it is for her advantage to load this commerce with as few obstacles as politics will permit. When the merchandizes, which several nations send to the Indies, are very dear, the inhabitants of that country give a great deal of their commodities, which are gold and silver, for very little of those of foreigners; the contrary to this happens when they are at a low price. It would perhaps be of use, that these nations should undersell each other, that by this means the merchandizes carried to the Indies might be always cheap. These are principles which deserve to be examined, without separating them, however, from

other considerations: the safety of the Indies, the advantages of one only custom-house, the danger of making great alterations, and the foreseen inconveniencies, which are often less dangerous than those which cannot be foreseen.

BOOK XXII.

Of Laws in relation to the Use of Money.

CHAP. I.

The reason of the Use of Money.

PEOPLE who have few merchandizes, as savages, and among civilized nations, those who have only two or three species, trade by exchange. Thus the caravans of Moors who go to Tambaçu, in the heart of Africa, have no need of money, for they exchange their salt for gold. The Moor puts his salt in a heap, and the Negro his dust in another; if there is not gold enough, the Moor takes away some of his salt, or the Negro adds more gold, till both parties are agreed.

But when a nation traffics with a great variety of merchandizes, money becomes necessary; because a metal easily carried from place to place, saves the great expences which people would be obliged to be at, if they always proceeded by exchange.

All nations having reciprocal wants, it frequently happens that one is desirous of a large quantity of the other's merchandizes, when the latter will have very little of theirs, though with respect to another nation the case is directly opposite. But when nations have money, and proceed by buying and selling,

selling, those who take most merchandizes pay the balance in specie. And there is this difference, that in the case of buying, the trade carried on is in proportion to the wants of the nation that has the greatest demands; whilst in bartering, the trade is only according to the wants of the nation whose demands are the fewest, without which this last would be under an impossibility of balancing its accounts.

CHAP. II.

Of the Nature of Money.

MONEY is a sign which represents the value of all merchandizes. Metal is taken for this sign as being durable *, because it consumes but little by use; and because, without being destroyed, it is capable of many divisions. A precious metal has been chosen as a sign, as being most portable. A metal is most proper for a common measure, because it can be easily reduced to the same standard. Every state fixes upon it a particular impression, to the end that the form may correspond with the standard and the weight, and that both may be known by inspection only.

The Athenians, not having the use of metals, made use of oxen †, and the Romans of sheep: but one ox is not the same as another ox, in the manner that one piece of metal may be the same as another.

As specie is the sign of the value of merchandizes, paper is the sign of the value of specie; and when it is of the right sort, it represents this value in such a manner, that as to the effects produced by it, there is not the least difference.

In

* The salt made use of for this purpose in Abyssinia, has this defect, that it is continually wasting away.

† Herodotus, in Clio, tells us that the Lydians found out the art of coining money; the Greeks learnt it from them; the Athenian coin had the impression of their antient ox. I have seen one of these pieces in the Earl of Pembroke's cabinet.

In the same manner, as money is the sign and representative of a thing, every thing is a sign and representative of money ; and the state is in a prosperous condition, when, on the one hand, money perfectly represents all things ; and on the other, all things perfectly represent money, and are reciprocally the signs of each other ; that is, they have such a relative value, that we may have the one as soon as we have the other. This never happens in any other than a moderate government, nor does it always happen there : for example, if the laws favour the dishonest debtor, his effects are no longer a representative or sign of money. With regard to a despotic government, it would be a prodigy, did things there represent their sign. Tyranny and distrust makes every one bury † his specie : things are not there then the representative of money.

Legislators have sometimes had the art, not only to make things, in their own nature, the representative of specie, but to convert them even into specie, like the current coin. Cæsar, when he was dictator (a), permitted debtors to give their lands in payment to their creditors, at the price they were worth before the civil war. Tiberius (b) ordered, that those who desired specie should have it from the public treasury, on binding over their lands to double the value. Under Cæsar, the lands were the money which paid all debts : under Tiberius, ten thousand sesterces in land became as current money, equal to five thousand sesterces in silver.

The Magna Charta of England provides against the seizing the lands or revenues of a debtor, when his moveable or personal goods are sufficient to pay, and he is willing to give them up to his creditors : by this means all the goods of an Englishman represented money.

The laws of the Germans constituted money a satisfaction for the injuries that were committed, and for the sufferings due to

† It is an ancient custom in Algiers, for the father of a family to have a treasure concealed in the earth. History of the kingdom of Algiers, by Logier de Tassis.

(a) Cæsar on the Civil War, Book iii.

(b) Tacitus, lib. vi.

to guilt. But as there was but very little specie in the country, they again constituted this money to be paid in goods or chattels. This we find appointed in a Saxon law, with certain regulations suitable to the ease and convenience of the several ranks of people. At first (c) the law declared the value of a sou in cattle; the sou of two tremises answered to an ox of twelve months, or to an ewe with her lamb; that of three tremises, was worth an ox of sixteen months. With these people money became cattle, goods, and merchandise; and these again became money.

Money is not only a sign of things; it is also a sign and representative of money, as we shall see in the chapter on exchange.

CHAP. III.

Of ideal Money.

THERE is both real and ideal money. Civilized nations generally make use of ideal money, only because they have converted their real money into ideal. At first their real money was some metal of a certain weight and standard: but soon dishonesty or want made them retrench a part of the metal from every piece of money, to which they left the same name; for example, from a livre at a pound weight they took half the silver, and still continued to call it a livre; the piece which was the twentieth part of a pound of silver, they continued to call a sou, though it is no more the twentieth part of this pound of silver. By this means the livre is an ideal livre, and the sou an ideal sou. Thus of the other subdivisions; and so far may this be carried, that what we call a livre may be only a small part of the original livre or pound, which renders it still more ideal.

(c) The Laws of the Saxons, chap. 18.

ideal. It may even happen, that we may have no piece of money of the precise value of a livre, nor any piece exactly worth a sou: the livre and the sou will be purely ideal. They may give to any piece of money the denomination of as many livres and as many sours as they please; the variation may be continual; because it is as easy to give another name to a thing, as it is difficult to change the thing itself.

To take away the source of this abuse, it would be an excellent law for all countries, who are desirous of making commerce flourish, to ordain, that none but real money should be current; and to prevent any methods from being taken to render it ideal.

Nothing ought to be so exempt from variation, as that which is the common measure of all.

Trade is in its own nature extremely uncertain: and it is a great evil to add a new uncertainty to that which is founded on the nature of the thing.

CHAP. IV.

Of the quantity of Gold and Silver.

WHILE civilized nations are the mistresses of the world, gold and silver, whether they draw it from amongst themselves, or fetch it from the mines, must increase every day. On the contrary, it diminishes when barbarous nations prevail. We know how great was the scarcity of these metals, when the Goths and Vandals on the one side, and on the other the Saracens and Tartars, broke in like a torrent on the civilized world.

The bullion drawn from the American mines, imported into Europe, and from thence sent to the east, has greatly promoted the navigation of the European nations; for it is a merchandise which Europe receives in exchange from America, and which she sends in exchange to the Indies. A prodigious quantity of gold and silver is therefore an advantage, when we consider these metals as a merchandise, but it is otherwise when we consider them as a sign; because their abundance

dance gives an allay to their quality as a sign, which is chiefly founded on their scarcity.

Before the first Punic war, copper was to silver as (a) 960 to 1 *; it is at present nearly as 73 and a half to one. When the proportion shall be as it was formerly, silver will better perform its office as a sign.

CHAP. V.

The reason why Interest was lowered one-half after the Conquest of the Indies.

GARCILASSO informs us (b), that in Spain after the conquest of the Indies, the interest which was at ten per cent. fell to five. This was a necessary consequence. A great quantity of specie being all of a sudden brought into Europe, much fewer persons had need of money. The price of all things increased, while the value of money diminished: the proportion was then broken, and all the old debts were discharged. We may recollect the time of the *system* †; when every thing was at a high price except specie. Those that had money, after the conquest of the Indies, were obliged to lower the price or hire of their merchandise; that is, in other words, their interest.

From this time they were unable to bring interest to its ancient standard, because the quantity of specie brought to Europe has been annually increasing. Besides, as the public funds of some states, founded on riches procured by commerce, gave but a very small interest, it became necessary for the contracts of individuals to be regulated by these. In short, the

VOL. II.

G

course

(a) See chap. 10. of this book.

* Supposing a mark or eight ounces of silver to be worth forty-nine livres, and copper twenty sols per pound.

(b) History of the Civil Wars of the Spaniards in the West Indies.

† In France, Mr Law's project was called by this name.

course of exchange having rendered the conveying of specie from one country to another remarkably easy, money cannot be scarce in a place where they may be so readily supplied with it, by those who have it in plenty.

CHAP. VI.

How the Price of Things is fixt in the variation of the Sign of Riches.

MONEY is the price of merchandises or manufactures. But how shall we fix this price? or, in other words, by what piece of money is every thing to be represented?

If we compare the mass of gold and silver in the whole world, with the quantity of merchandises therein contained, it is certain that every commodity or merchandise in particular, may be compared to a certain portion of the intire mass of gold and silver. As the total of the one is to the total of the other, so part of the one will be to part of the other. Let us suppose, that there is only one commodity or merchandise in the world, or only one to be purchased, and that this is divisible like money: a part of this merchandise will answer to a part of the mass of gold and silver; the half of the total of the one, to the half of the total of the other; the tenth, the hundredth, the thousandth part of the one, to the tenth, the hundredth, the thousandth part of the other. But as that which constitutes property amongst mankind is not all at once in trade; and as the metals or money, which are the sign of property, are not all in trade at the same time; the price is fixed in the compound ratio of the total of things with the total of signs, and that of the total of things in trade with the total of signs in trade also: And as the things which are not in trade to-day may be in trade to-morrow, and the signs not now in trade may enter into trade at the same time, the establishment of the price of things always fundamentally depends on the proportion of the total of things to the total of signs.

Thus.

Thus the prince or the magistrate can no more ascertain the value of the merchandises, than he can establish by a decree that the relation one has to ten, is equal to that of one to twenty. Julian's (a) lowering the price of provisions at Antioch, was the cause of a most terrible famine.

The negroes on the coast of Africa have a sign of value without money. It is a sign merely ideal, founded on the degree of esteem which they fix in their minds for every merchandise, in proportion to the need they have of it. A certain commodity or merchandise is worth three macoutes; another, six macoutes; another ten macoutes; that is, as if they said simply three, six, and ten. The price is formed by a comparison of all merchandises with each other. They have therefore no particular money; but each kind of merchandise is money to the other.

Let us for a moment transfer to ourselves this manner of valuing things, and join it to ours: all the merchandises and goods in the world, or else all the merchandises or manufactures of a state, particularly considered as separate from all others, would be worth a certain number of macoutes; and, dividing the money of this state into as many parts as there are macoutes, one part of this division of money will be the sign of a macoute.

If we suppose the quantity of specie in a state doubled, it will be necessary to double the specie in the macoute; but if, in doubling the specie, you double also the macoute, the proportion will remain the same as before the doubling of either.

If since the discovery of the Indies, gold and silver have increased in Europe in the proportion of one to twenty, the price of provisions and merchandises must have been enhanced in proportion of one to twenty. But if, on the other hand, the number of merchandises has increased as one to two, it necessarily

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(a) History of the Church by Socrates.

farily follows, that the price of these merchandises and provisions having been raised in proportion of one to twenty, and fallen in proportion of one to two; it necessarily follows, I say, that the proportion is only as one to ten.

The quantity of goods and merchandises increases by an augmentation of commerce, the augmentation of commerce by an augmentation of the specie which successively arrives, and by new communications with fresh discovered countries and seas, which furnish us with new commodities and new merchandises.

CHAP. VII.

Of the relative scarcity of Gold and Silver.

BESIDES the positive plenty and scarcity of gold and silver, there is still a relative abundance, and a relative scarcity of one of these metals compared to the other.

The avaricious hoard up their gold and silver, because, as they do not care to spend, they are fond of signs that are not subject to decay. They prefer gold to silver, because, as they are always afraid of losing, they can best conceal that which takes up the least room. Gold therefore disappears when there is plenty of silver, because every one has some to conceal; it appears again when silver is scarce, because they are obliged to draw it from its confinement.

It is then a rule, that gold is common when silver is scarce, and gold is scarce when silver is common. This lets us see the difference between their relative, and their real abundance and scarcity, of which I shall presently speak more at large.

CHAP. VIII.

Of Exchange.

THE relative abundance and scarcity of specie in different countries forms what is called the course of exchange.

Exchange.

Exchange is a fixing of the actual and momentary value of money.

Silver, as a metal, has a value like all other merchandises, and an additional value as it is capable of becoming the sign of other merchandises. If it was no more than a mere merchandise, it would, no doubt, lose much of its value.

Silver, as money, has a value, which the Prince in some respects can fix, and in others he cannot.

1. The Prince establishes a proportion between a quantity of silver as metal, and the same quantity as money. 2. He fixes the proportion between the several metals made use of as money. 3. He establishes the weight and standard of every piece of money. 4. In fine, he gives to every piece that ideal value of which I have spoken. I shall call the value of money in these four respects its *positive value*, because it may be fixed by law.

The coin of every state has, besides this, a relative value, as it is compared with the money of other countries. This relative value is established by the exchange, and greatly depends on its positive value. It is fixed by the general opinion of the merchants, never by the decrees of the Prince; because it is subject to incessant variations, and depends on a thousand accidents.

The several nations, in fixing this relative value, are chiefly guided by that which has the greatest quantity of specie. If she has as much specie as all the others together, it is then most proper for the others to regulate their's by her standard; and the regulation between all the others will pretty nearly agree with the regulation made with this principal nation.

In the actual state of the universe, Holland * is the nation we are speaking of. Let us examine the course of exchange with relation to her.

They

* The Dutch regulate the exchange for almost all Europe, by a kind of determination amongst themselves, in a manner most agreeable to their own interests.

They have in Holland a piece of money called a florin, worth twenty fous or forty half-fous or gros. But, to render our ideas as simple as possible, let us imagine that they have not any such piece of money in Holland as a florin, and that they have no other but the gros : a man who should have a thousand florins, would have forty thousand gros ; and so of the rest. Now the exchange with Holland is determined by our knowing how many gros every piece of money in other countries is worth ; and as the French commonly reckon by a crown of three livres, the exchange makes it necessary for them to know how many gros are contained in a crown of three livres. If the course of exchange is at fifty-four, a crown of three livres will be worth fifty-four gros ; if it is at sixty, it will be worth sixty gros. If silver is scarce in France, a crown of three livres will be worth more gros ; if plentiful, it will be worth less.

This scarcity or plenty, from whence results the mutability of the course of exchange, is not the real, but a relative scarcity or plenty. For example ; when France has greater occasion for funds in Holland, than the Dutch of having funds in France, specie is said to be common in France, and scarce in Holland ; and *vice versa*.

Let us suppose that the course of exchange with Holland is at fifty-four. If France and Holland composed only one city, they would act as we do when we give change for a crown : The Frenchman would take three livres out of his pocket, and the Dutchman fifty-four gros from his. But as there is some distance between Paris and Amsterdam, it is necessary that he who, for my crown of three livres, gives me fifty-four gros, which he has in Holland, should give me a bill of exchange for fifty-four gros payable in Holland. The fifty-four gros is not the thing in question ; but a bill for that sum. Thus, in order to judge of the * scarcity or plenty of specie,

we

* There is much specie in a place, when there is more specie than paper ; there is little, when there is more paper than specie.

we must know if there are in France more bills of fifty-four gros drawn upon Holland, than there are crowns drawn upon France. If there are more bills from Holland, than there are from France, specie is scarce in France, and common in Holland; it then becomes necessary that the exchange should rise, and that they give for my crown more than fifty-four gros; otherwise I will not part with it, and *vice versa*.

Thus the various turns in the course of exchange form an account of debtor and creditor, which must be frequently settled; and which the state in debt can no more discharge by exchange, than an individual can pay a debt by giving change for a piece of silver.

We will suppose that there are but three states in the world, France, Spain, and Holland; that several individuals in Spain are indebted to France to the value of one hundred thousand (a) marks of silver; and that several individuals of France owe in Spain one hundred and ten thousand marks: now, if some circumstance both in Spain and France should cause each suddenly to withdraw his specie, what will then be the course of exchange? These two nations will reciprocally acquit each other of an hundred thousand marks; but France will still owe ten thousand marks in Spain, and the Spaniards will still have bills upon France to the value of ten thousand marks; while France will have none at all upon Spain.

But if Holland was in a contrary situation with respect to France, and in order to balance the account must pay her ten thousand marks, the French would have two ways of paying the Spaniards; either by giving their creditors in Spain bills for ten thousand marks upon their debtors in Holland, or else by sending specie to the value of ten thousand marks to Spain.

From hence it follows, that when a state has occasion to remit a sum of money into another country, it is indifferent in the nature of the thing, whether specie be conveyed thither, or they take bills of exchange. The advantage or disadvantage of these

two

(a) A mark is a weight of eight ounces.

two methods solely depends on actual circumstances. We must enquire which will yield most gros in Holland, money carried thither in specie, or a bill upon Holland for the like sum*.

When money of the same standard and weight in France yields money of the same standard and weight in Holland, we say that the exchange is at par. In the actual state of specie (a) the par is nearly at fifty-four gros to the crown. When the exchange is above fifty-four gros, we say it is high: when beneath we say it is low.

In order to know the loss and gain of a state, in a particular situation of exchange, it must be considered as debtor and creditor, as buyer and seller. When exchange is below par, it loses as a debtor and gains as a creditor; it loses as a buyer, and gains as a seller. It is obvious, it loses as debtor: suppose, for example, France owes Holland a certain number of gros, the fewer gros there are in a crown, the more crowns she has to pay: on the contrary, if France is creditor for a certain number of gros, the less number of gros there are in a crown, the more crowns she will receive. The state loses also as buyer; for there must be the same number of gros, to buy the same quantity of merchandises; and while the exchange is low, every French crown is worth fewer gros. For the same reason the state gains as a seller; I sell my merchandise in Holland for a certain number of gros; I receive then more crowns in France, when for every fifty gros I receive a crown, than I should do if I received only the same crown for ever fifty-four. The contrary to this takes place in the other state. If the Dutch are indebted a certain number of crowns to France, they will gain; if they are owing to them, they will lose; if they sell they lose, and if they buy they gain.

It is proper to pursue this something farther. When the exchange is below par, for example, if it is at fifty instead of fifty-four, it should follow that France, on sending bills of exchange to

* With the expence of carriage and insurance deducted.

(a) In 1744.

to Holland for fifty-four thousand crowns, could buy merchandises only to the value of fifty thousand; and that, on the other hand, the Dutch sending the value of fifty thousand crowns to France, might buy fifty-four thousand, which makes a difference of $\frac{8}{54}$ ths, that is, a loss to France of more than $\frac{1}{7}$ th; so that France would be obliged to send to Holland $\frac{1}{7}$ th more in specie or merchandise, than she would do was the exchange at par. And as the mischief must constantly increase, because a debt of this kind would bring the exchange still lower, France would in the end be ruined. It seems, I say, as if this should certainly follow; and yet it does not, because of the principle which I have (a) elsewhere established, which is, that states constantly lean towards a balance, in order to preserve their independence. Thus they borrow only in proportion to their ability to pay, and measure their buying by what they sell; and taking the example from above, if the exchange falls in France from fifty-four to fifty, the Dutch who buy merchandises in France to the value of a thousand crowns, for which they used to pay fifty-four thousand gros, would now pay only fifty thousand, if the French would consent to it. But the merchandise of France will rise insensibly, and the profit will be shared between the French and the Dutch; for when a merchant can gain, he easily shares his profit: there arises then a communication of profit between the French and the Dutch. In the same manner, the French, who bought merchandises of Holland for fifty-four thousand gros, and who when the exchange was at fifty-four paid for them a thousand crowns, will be obliged to add $\frac{1}{7}$ th more in French crowns to buy the same merchandises. But the French merchant being sensible of the loss he suffers, will take up less of the merchandise of Holland. The French and the Dutch merchant will then be both losers, the state will insensibly fall into a balance, and the lowering of the exchange will not be attended with those inconveniencies which we had reason to fear.

VOL. II.

H

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(a) See Book xx. Chap. 19.

A merchant may send his stock into a foreign country when the exchange is below par, without injuring his fortune ; because when it returns, he recovers what he had lost ; but a prince, who sends only specie into a foreign country, which never can return, is always a loser.

When the merchants have great dealings in any country, the exchange there infallibly rises. This proceeds from their entering into many engagements, buying great quantities of merchandises, and drawing upon foreign countries to pay for them.

A prince may amass great wealth in his dominions, and yet specie may be really scarce, and relatively common ; for instance, if this state is indebted for many merchandises to a foreign country, the exchange will be low, though specie be scarce.

The exchange of all places constantly tends to a certain proportion, and that in the very nature of things. If the course of exchange from Ireland to England is below par, and that of England to Holland is also under par, that of Ireland to Holland will be still lower ; that is, in the compound ratio of that of Ireland to England, and that of England to Holland : for a Dutch merchant who can have his specie indirectly from Ireland, by the way of England, will not chuse to pay dearer by having it the direct way. This, I say, ought naturally to be the case : but however it is not exactly so ; there are always circumstances which vary these things ; and the different profit of drawing by one place, or of drawing by another, constitutes the particular art and dexterity of the bankers, which does not belong to the present subject.

When a state raises its specie ; for instance, when it gives the name of six livres, or two crowns, to what was before called three livres, or one crown, this new denomination, which adds nothing real to the crown, ought not to procure a single gros more by the exchange. We ought only to have for the two new crowns the same number of gros which we before received for the old one. If this does not happen, it must not be imputed as an effect of the regulation itself ; but to the novelty and suddenness of the affair. The exchange adheres to what is already established, and is not altered till after a certain time.

When

When a state, instead of only raising the specie by a law, calls it in, in order to diminish its size, it frequently happens that during the time taken up in its passing again through the mint, there are two kinds of money ; the large, which is the old, and the small, which is the new ; and as the large is cried down, and is not to be received, but at the mint, and bills of exchange must consequently be paid in the new, one would imagine then that the exchange should be regulated by the new. If, for example, in France, the ancient crown of three livres, being worth in Holland sixty gros, were reduced one half, the new crown ought to be valued only at thirty. On the other hand, it seems as if the exchange ought to be regulated by the old coin ; because the banker who has specie, and receives bills, is obliged to carry the old coin to the mint, in order to change it for the new : by which he must be a loser. The exchange then ought to be fixed between the value of the old coin, and that of the new. The value of the old is decreased, if we may call it so, both because there is already some of the new in trade, and because the bankers cannot keep up to the rigour of the law ; having an interest in letting loose the old coin from their chests, and being even sometimes forced to make payments with it. Again, the value of the new specie must rise ; because the banker having this, finds himself in a situation, in which, as we shall immediately prove, he will reap great advantage by procuring the old. The exchange should then be fixed, as I have already said, between the new and the old coin. For then the bankers find it for their interest to send the old out of the kingdom ; because by this means they procure the same advantage as they could receive from a regular exchange of the old specie, that is a great many gros in Holland, and in return a regular exchange a little lower, between the old and new specie, which will bring many crowns in France.

Suppose that three livres of the old coin yield by the actual exchange forty-five gros, and that by sending this same crown to Holland they receive sixty ; but with a bill of forty-five gros, they procure a crown of three livres in France, which

being sent in the old specie to Holland, still yields sixty gros : Thus all the old specie would be sent out of the kingdom, and the bankers would run away with the whole profit.

To remedy this, new measures must be taken. The state, which coined the new specie, would itself be obliged to send great quantities of the old to the nation which regulates the exchange, and by thus gaining credit there raise the exchange pretty nearly to as many gros for a crown of three livres, as could be got by sending a crown of three livres of the old specie out of the country. I say, to nearly the same ; for while the profits are small, the bankers will not be tempted to send it abroad, because of the expence of carriage, and the danger of confiscation.

It is fit that we should give a very clear idea of this. Mr Bernard, or any other banker employed by the state, proposes bills upon Holland, and gives them at one, two, or three gros higher than the actual exchange ; he has made a provision in a foreign country by means of the old specie which he has continually been sending thither ; and thus he has raised the exchange to the point we have just mentioned. In the mean time, by disposing of his bills, he seizes on all the new specie, and obliges the other bankers who have payments to make, to carry their old specie to the mint, and, as he insensibly obtains all the specie, he obliges the other bankers in their turn to give him bills at a very high exchange. By this means, his profit in the end compensates in a great measure for the loss he suffered at the beginning.

It is evident, that during these transactions, the state must be in a dangerous crisis. Specie must become extremely scarce ; 1. because much the greatest part is cried down : 2. because a part will be sent into foreign countries : 3. because every one will lay it up, as not being willing to give that profit to the prince, which he hopes to receive himself. It is dangerous to do it slowly ; and dangerous also to do it in too much haste. If the supposed gain be immoderate, the inconveniencies increase in proportion.

We

We see, from what has been already said, that when the exchange is lower than the specie, a profit may be made by sending it abroad; for the same reason, when it is higher than the specie, there is a profit in causing it to return.

But there is a case in which profit may be made by sending the specie out of the kingdom, when the exchange is at par; that is, by sending it into a foreign country to be coined over again. When it returns an advantage may be made of it, whether it be circulated in the country, or paid for foreign bills.

If a company has been erected in a state with a prodigious stock, and this stock has in a few months been raised twenty or twenty-five times above the original purchase; if again, the same state established a bank, whose bills were to perform the office of specie, while the numerary value of these bills was prodigious in order to answer to the numerary value of the stocks, (this is Mr Law's system); it would follow from the nature of things, that these stocks and these bills would vanish in the same manner as they arose. Stocks cannot suddenly be raised twenty or twenty-five times above their original value, without giving a number of people the means of procuring immense riches in paper: every one would seek to secure his fortune; and as exchange offers the most easy way of removing it from home, or conveying it whither one pleases, people would incessantly remit a part of their effects to the nation that regulates the exchange. A project for making continual remittances into a foreign country, must lower the exchange. Let us suppose, that at the time of the system, in proportion to the standard and weight of the silver coin, the exchange was fixed at forty gros to the crown; when a vast quantity of paper became money, they were unwilling to give more than thirty-nine gros for a crown, and afterwards thirty-eight, thirty-seven, &c. This proceeded so far, that after a while they would give but eight gros, and at last there was no exchange at all.

The exchange ought in this case to have regulated the proportion between the specie and the paper of France. I suppose that
by

by the weight and standard of the silver, the crown of three livres in silver was worth forty gros, and that the exchange being made in paper, the crown of three livres in paper was worth only eight gros, the difference was four-fifths. The crown of three livres in paper was then worth four-fifths less than the crown of three livres in silver.

CHAP. IX.

On the Proceedings of the Romans with respect to Money.

HOW great soever the exertion of authority has been in our times, with respect to the specie of France during the administration of two successive ministers, still it was vastly exceeded by the Romans; not at the time when corruption had crept into their republic, nor when they were in a state of anarchy; but when they were, as much by their wisdom as their courage, in the full vigour of their constitution, after having conquered the cities of Italy, and at the very time that they disputed the empire with the Carthaginians.

And here I am pleased that I have an opportunity of examining more closely into this matter, that no example may be taken from what can never justly be called one.

In the first Punic war (a) the *As*, which ought to be twelve ounces of copper, weighed only two, and in the second it was no more than one. This retrenchment answers to what we now call the raising of coin. To take half the silver from a crown of six livres, in order to make two crowns, or to raise it to the value of twelve livres, is precisely the same thing.

They have left us no monument of the manner in which the Romans conducted this affair in the first Punic war; but what they did in the second is a proof of the most consummate wisdom. The republic found herself under an impossibility of
paying

(a) Pliny's Natural History, Lib. xxxiii, Art. 13.

paying her debts ; the As weighed two ounces of copper, and the Denarius, valued at ten Asses, weighed twenty ounces of copper. The republic being willing to gain half on her creditors, made the As of an ounce of copper, and by this means paid the value of a Denarius with ten ounces. This proceeding must give a great shock to the state ; they were obliged therefore to break the force of it as well as they could. It was in itself unjust, and it was necessary to render it as little so as possible. They had in view the deliverance of the republic, with respect to the citizens ; they were not therefore obliged to direct their view to the deliverance of the citizens, with respect to each other. This made a second step necessary. It was ordained, that the Denarius, which hitherto contained but ten Asses, should contain sixteen. The result of this double operation was, that while the creditors of the republic lost one half*, those of individuals lost only a fifth † ; the price of merchandises was increased only a fifth ; the real change of the money was only a fifth. The consequences are obvious.

The Romans than conducted themselves with greater prudence than we, who in our transactions involved both the public treasure and the fortunes of individuals. But this is not all ; their affairs were carried on amidst more favourable circumstances than ours.

CHAP. X.

The Circumstances in which the Romans changed the Value of their Specie.

THERE was formerly very little gold and silver in Italy.

This country has few or no mines of gold or silver. When Rome was taken by the Gauls, they found only a thousand (a) weight

* They received ten ounces of copper for twenty.

† They received sixteen ounces of copper for twenty.

(a) Pliny, Lib. xxxiii. Art. 5.

weight of gold. And yet the Romans had sacked many powerful cities, and brought home their wealth. For a long time they made use of none but copper money; and it was not till after the peace with Pyrrhus, that they had silver enough to make (b) money; they made denarii of this metal of the value of ten asses *, or ten pounds of copper. At that time the proportion of silver was to that of copper as 1 to 960. For as the Roman denarius was valued at ten asses, or ten pounds of copper, it was worth one hundred and twenty ounces of copper; and as the same denarius was valued only at one eighth of an ounce of silver †, this produced the above proportion.

When Rome became mistress of that part of Italy which is nearest to Greece and Sicily, by degrees she found herself between two rich nations, the Greeks and the Carthaginians. Silver increased at Rome; and as the proportion of 1 to 960 between silver and copper could be no longer supported, she made several regulations with respect to money, which to us are unknown. However, at the beginning of the second Punic war, the (c) Roman denarius was worth no more than twenty ounces of copper; and thus the proportion between silver and copper was no longer but as 1 to 160. The reduction was very considerable, since the republic gained five-sixths upon all copper money. But she did only what was necessary in the nature of things, by establishing the proportion between the metals made use of as money.

The peace which terminated the first Punic war, left the Romans masters of Sicily. They soon entered Sardinia; afterwards they began to know Spain; and thus the quantity of silver increased at Rome. They took measures to reduce the (d) denarius

(b) Frenschimius, lib. v. of the 2d Decad.

* Frenschimius, lib. v. Decad. 2. They struck also, says the same author, half denarii, called quinarii, and quarters called sesterces.

† An eighth according to Budæus; according to other authors, a seventh.

(c) Pliny's Natural History, Lib. xxxiii. Art. 13.

(d) Ibid.

denarius from twenty ounces to sixteen, which had the effect of putting a nearer proportion between silver and copper; by this means the proportion, which was before as 1 to 160, was now made as 1 to 128.

CHAP. XI.

Proceedings with respect to Money in the time of the Emperors.

IN the changes made in the specie during the time of the republic, they proceeded by diminishing it; the state reposed in the people the knowledge of its wants, and did not pretend to deceive them. Under the Emperors they proceeded by way of alloy. These princes reduced to despair, even by their liberalities, found themselves obliged to degrade the specie; an indirect method, which diminished the evil, without seeming to touch it. They withheld a part of the gift, and yet concealed the hand that did it; and, without speaking of the diminution of the pay, or of the gratuity, it was found diminished.

We even still see (b) in cabinets a kind of medals, which are called plated; and are only pieces of copper covered with a thin plate of silver. This money is mentioned in a fragment of the 77th book of Dio (c).

Didus-Julian first began to debase it. We find that the coin of * Caracalla had an alloy of more than half; that of Alexander Severus (d), of two-thirds: the debasing still increased, till under Gallienus (e), nothing was to be seen but copper silvered over.

VOL. II.

I

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(b) See Father Jourbet's Science of Medals, Paris edit. of 1739. p. 59.

(c) Extract of Virtues and Vices.

* See Savotte, part. 2. chap 12. and Le Journal des Sçavans of the 18th of July, 1681. on a discovery of fifty thousand medals.

(d) See Savotte, *ibid.*

(e) *Ibid.*

It is evident, that such violent proceedings could not take place in the present age; a prince might deceive himself, but he could deceive nobody else. The change has taught the banker to draw a comparison between all the money in the world, and to establish its just value. The standard of money can no longer be a secret. Were the prince to begin to alloy his silver, every body else would continue it, and do it for him; the specie of the true standard would go abroad first, and nothing would be sent back but base metal. If, like the Roman Emperors, he debased the silver, without debasing the gold, the gold would suddenly disappear, and he would be reduced to his bad silver. The exchange, as I have said in the preceding book (e), has deprived princes of the opportunity of shewing great exertions of authority, or at least has rendered them ineffectual.

CHAP. XII.

How the Exchange is a constraint on Despotic Power.

MUSCOVY would have descended from its despotic power, but could not. The establishment of commerce depended on that of the exchange, and the transactions of exchange were inconsistent with all its laws.

In 1745, the Czarina made a law to expel the Jews, because they remitted into foreign countries the specie of those who were banished into Siberia, as well as that of the foreigners entertained in her service. As all the subjects of the empire are slaves, they can neither go abroad themselves, nor send away their effects without permission. The exchange, which gives them the means of remitting their specie from one country to another, is therefore entirely incompatible with the laws of Muscovy.

Commerce

(e) Chap. 16.

Commerce itself is inconsistent with the Russian laws. The people are composed only of slaves employed in agriculture, and of slaves called ecclesiastics, or gentlemen, who are lords of those slaves: there is then nobody left for the third estate, which ought to be composed of mechanics and merchants.

CHAP. XIII.

The Practice of some Countries in Italy.

THEY have made laws in some parts of Italy to prevent subjects from selling their lands, in order to remove their specie into foreign countries. These laws may be good when the riches of a state are so connected with the country itself, that there would be great difficulty in transferring them to another. But since, by the course of exchange, riches are in some degree independent on any particular state, and since they may with so much ease be conveyed from one country to another; that must be a bad law which will not permit persons for their own interest to dispose of their lands, while they can dispose of their money. It is a bad law, because it gives an advantage to moveable effects, in prejudice to the land; because it deters strangers from settling in the country, and, in short, because it may be eluded.

CHAP. XIV.

The Assistance a State may derive from Bankers.

THE bankers business is to change, not to lend money. If the prince makes use of them to exchange his specie, as he never does but in great affairs, the least profit he can give for the remittance becomes considerable: and if they demand large profits, we may be certain that there is a fault in the administration. On the contrary, when they are employed to advance

specie, their art consists in procuring the greatest profit for the use of it, without being liable to be charged with usury.

CHAP. XV.

Of Public Debts.

SOME have imagined that it was for the advantage of a state to be indebted to itself: they thought that this multiplied riches by increasing the circulation.

Those who are of this opinion have, I believe, confounded a circulating paper which represents money, or a circulating paper which is the sign of the profits that a company has, or will make by commerce, with a paper which represents a debt. The two first are extremely advantageous to the state: the last can never be so; and all that we can expect from it is, that individuals have a good security from the government for their payment. But let us see the inconveniences which result from it.

1. If foreigners possess much paper which represents a debt, they annually draw out of the nation a considerable sum for the interest.
2. A nation that is thus perpetually in debt, must have the exchange very low.
3. The taxes raised for the payment of the interest of the debt, are a hurt to the manufacturer, by raising the price of the artificer's labour.
4. It takes the true revenue of the state from those who have activity and industry, to convey it to the indolent, that is, it gives the conveniences for labour to those who do not labour, and clogs with difficulties the industrious artist.

These are its inconveniences; I know of no advantages. Ten persons have each a yearly income of a thousand crowns, either in land, or trade; this raises to the nation at five per cent. a capital of two hundred thousand crowns. If these ten persons employed the half of their income, that is five thousand crowns, in

in paying the interest of an hundred thousand crowns which they had borrowed of others, that would be only to the state as two hundred thousand crowns; that is, in the language of the Algebraists, $200,000 \text{ crowns} - 100,000 \text{ crowns} + 100,000 \text{ crowns} = 200,000 \text{ crowns}$.

People are thrown perhaps into this error, by reflecting that the paper which represents the debt of a nation is the sign of riches; for none but a rich state can support such paper without falling into decay. And if it does not fall, it is a proof that the state has other riches besides. They say that it is not an evil, because there are resources against it; and that it is an advantage, because these resources surpass the evil.

CHAP. XVI.

Of the Payment of Public Debts.

IT is necessary that there should be a proportion between the state as creditor, and the state as debtor. The state may be a creditor to infinity, but it can only be a debtor to a certain degree, and when it surpasses that degree, the title of creditor vanishes.

If the credit of the state has never received the least blemish, it may do what has been so happily practised in one of the kingdoms (a) of Europe; that is, it may acquire a great quantity of specie, and offer to reimburse every individual, at least if they will not reduce their interest. When the state borrows, the individuals fix the interest; when it pays, the interest for the future is fixed by the state.

It is not sufficient to reduce the interest; it is necessary to erect a sinking fund from the advantage of the reduction, in order to pay every year a part of the capital: a proceeding so happy, that its success increases every day.

When

(a) England,

When the credit of the state is not entire, there is a new reason for endeavouring to form a sinking fund, because this fund being once established, will soon procure the public confidence.

1. If the state is a republic, the government of which is in its own nature consistent with its entering into projects of a long duration, the capital of the sinking fund may be inconsiderable: but it is necessary in a monarchy for the capital to be much greater.

2. The regulations ought to be so ordered, that all the subjects of the state may support the weight of the establishment of these funds, because they have all the weight of the establishment of the debt; thus the creditor of the state, by the sums he contributes, pays himself.

3. There are four classes of men, who pay the debts of the state: The proprietors of the land, those engaged in trade, the labourers and artificers, and, in fine, the annuitants either of the state or of private people. Of these four classes the last, in a case of necessity, one would imagine, ought least to be spared; because it is a class entirely passive, while the state is supported by the active vigour of the other three. But as it cannot be higher taxed without destroying the public confidence, of which the state in general, and these three classes in particular, have the utmost need; as a breach in the public faith cannot be made on a certain number of subjects, without seeming to be made on all; as the class of creditors is always the most exposed to the projects of ministers, and always in their eye, and under their immediate inspection, the state is obliged to give them a singular protection, that the part which is indebted may never have the least advantage over that which is the creditor*.

CHAP.

* We speak not here of gold and silver considered as a merchandise.

CHAP. XVII.

Of Lending upon Interest.

SPECIE is the sign of value. It is evident that he who has occasion for this sign ought to pay for the use of it, as well as every thing else he has occasion for. All the difference is, that other things may be hired or bought; whilst money, which is the price of things, can only be hired, and not bought.

To lend money without interest, is certainly an action laudable and extremely good; but it is obvious, that it is only a counsel of religion, and not a civil law.

In order that trade may be successfully carried on, it is necessary that a price may be fixed on the use of specie; but this price should be very inconsiderable. If it be too high, the merchant that fees it will cost him more in interest than he can gain by commerce, will undertake nothing: if there is no consideration to be paid for the use of specie, no body will lend it; and here too the merchant will undertake nothing.

I am mistaken when I say no body will lend: the affairs of society must ever make it necessary. Usury will be established; but with all the disorders with which it has been constantly attended.

The laws of Mahomet confound usury with lending upon interest. Usury increases in Mahometan countries, in proportion to the severity of the prohibition. The lender indemnifies himself for the danger he undergoes of suffering the penalty.

In those eastern countries, the greatest part of the people are secure of nothing; there is hardly any proportion between the actual possession of a sum, and the hope of receiving it again after having lent it: usury then must be raised in proportion to the danger of insolvency.

CHAP.

CHAP. XVIII.

Of Maritime Usury.

THE greatness of maritime usury is founded on two things: the danger of the sea, which makes it proper that those who expose their specie should not do it without considerable advantage; and the ease with which the borrower by the means of commerce speedily accomplishes a variety of great affairs. But usury, with respect to land-men, not being founded on either of these two reasons, is either prohibited by the legislators, or, what is more rational, reduced to proper bounds.

CHAP. XIX.

Of Lending by Contract, and the State of Usury amongst the Romans.

BESIDES the loans made for the advantage of commerce, there is still a kind of lending by a civil contract, from whence results interest or usury.

As the people of Rome increased every day in power, the magistrates sought to insinuate themselves into their favour by enacting such laws as were most agreeable to them. They retrenched capitals; first lowered, and at length prohibited interest; they took away the power of confining the debtor's body; in fine, the abolition of debts was contended for, whenever a tribune was disposed to render himself popular.

These continual changes, whether made by the laws, or by the Plebiscita, naturalised usury at Rome: for the creditors seeing the people their debtor, their legislator, and their judge, had no longer any confidence in their agreements; the people, like a debtor who has lost his credit, could only tempt them to lend by allowing an exorbitant interest; especially as the laws applied a remedy to the evil only from time to time, while the complaints of the people were continual, and constantly intimidated the

the creditors. This was the cause that all honest means of borrowing and lending were abolished at Rome, and that the most monstrous usury established (a) itself in that city, notwithstanding the strict prohibition and severity of the law.

Cicero tells us, that in his time interest at Rome was at thirty-four *per cent.* and in the (b) provinces at forty-eight. This evil was a consequence of the severity of the laws against usury. Laws excessively good are the source of excessive evils. The borrower found himself under a necessity of paying for the interest of the money, and for the danger the creditor underwent of suffering the penalty of the law.

The primitive Romans had not any laws to regulate the rate of usury*. In the contests which arose on this subject between the plebeians and the patricians, even in the sedition † on the *Mons sacer*, nothing was alledged on the one hand but promise, and on the other but the severity of contracts.

They then only followed private agreements, which I believe were most commonly at twelve *per cent. per annum.* My reason is, that in the ancient ‡ language of the Romans, interest at six *per cent.* was called half usury, and interest at three *per cent.* quarter usury. Total usury must therefore have been interest at twelve *per cent.*

But if it be asked, how such great interest could be established amongst a people almost without commerce? I answer that this people, being very often obliged to go to war without pay, were under a frequent necessity of borrowing: and as they incessantly made happy expeditions, they were commonly very able to pay. This is visible from the recital of the contests which arose on this subject; they did not disagree concerning the avarice of creditors, but said that those who complained

VOL. II.

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might

(a) Tacit. Annal, lib. vi.

(b) Letters to Atticus, lib. 5. let. 21.

* Usury and interest amongst the Romans signified the same thing.

† See Dionysius Halicarn. who has described it so well.

‡ *Usuræ semisses, trientes, quadrantes.* See the several titles of the digests and codes on usury, and especially the 17th law, with the note ff. de Usuris.

might have been able to pay, had they lived in a more * regular manner.

They then made laws, which had only an influence on the present situation of affairs: they ordained, for instance, that those who enrolled themselves for the war they were engaged in, should not be molested by their creditors; that those who were in prison should be set at liberty; that the most indigent should be sent into the colonies; and sometimes they opened the public treasury. The people, being eased of their present burdens, became appeased; and as they required nothing for the future, the senate were far from providing against it.

At the time when the senate maintained the cause of usury with so much constancy, the Romans were distinguished by an extreme love of frugality, poverty, and moderation: but the constitution was such, that the principal citizens alone supported all the expences of government, while the common people paid nothing. How then was it possible to deprive the former of the liberty of pursuing their debtors, and at the same time to oblige them to execute their offices, and to support the republic amidst its most pressing necessities?

Tacitus says, that the law of the twelve tables fixed the interest at one *per cent.* It is evident that he was mistaken, and that he took another law, of which I am going to speak, for the law of the twelve tables. If this had been regulated in the law of the twelve tables, why did they not make use of its authority in the disputes which afterwards arose between the creditors and debtors? We find not any vestige of this law upon lending at interest; and let us have but ever so little knowledge of the history of Rome, we shall see that a law like this could never be the work of the decemvirs.

The Licinian law, made (a) eighty-five years after the law of the twelve tables, was one of those temporary laws of which
we

* See Appian's speech on this subject in Dionysius Halicarnassensis.

(a) In the year of Rome 388. Tit. Liv. lib. vi.

we have spoken. It ordained, that what had been paid for interest should be deducted from the principal, and the rest discharged by three equal payments.

In the year of Rome 398, the tribunes Duellius and Menenius caused a law to be passed, which reduced the interest to (b) one *per cent. per annum*. It is this law which Tacitus (c) confounds with the law of the twelve tables, and this was the first ever made by the Romans to fix the rate of interest. Ten years after *, this usury was reduced one-half (d); and in the end entirely abolished (e); and if we may believe some authors whom Livy had read, this was under the consulate of † C. Martius Rutilius and P. Servilius, in the year of Rome 413.

It fared with this law as with all those in which the legislator carries things to excess; an infinite number of ways were found to elude it. They enacted therefore many others to confirm, correct, and temper it. Sometimes they quitted ‡ the laws to follow the common practice, at others the common practice to follow the laws; but in this case, custom easily prevailed. When a man wanted to borrow, he found an obstacle in the very law made in his favour; this law must be evaded by the person it was made to succour, and by the person it condemned. Sempronius Asellus, the prætor, having permitted the || debtors to act in conformity to the laws, was (a) slain by the creditors for attempting to revive the memory of a severity that could no longer be supported.

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Under

(b) *Unciaria usura*. Tit. Liv. lib. vii.

(c) *Annal. lib. vi.*

* Under the consulate of L. Manlius Torquatus, and C. Plautius, according to T. Liv. lib. vii. This is the law mentioned by Tacitus, *Annal. lib. vi.*

(d) *Semiunciaria usura*.

(e) As Tacitus says, *Annal. lib. vi.*

† This law was passed at the instance of M. Genucius, tribune of the people. Tit. Liv. lib. vii. towards the end.

‡ *Veteri jam more fœnus receptum erat*. Appian on the Civil War, Lib. i.

|| *Permisit eos legibus agere*. Appian on the Civil War, Lib. i. and the Epitome of Livy, Lib. lxiv.

(a) In the year of Rome 663.

Under Sylla, L. Valerius Flaccus made a law, which suffered interest to be at three *per cent. per annum*. This law, the most moderate, the most equitable ever made on this account by the Romans, is disapproved by Paterculus †. But if this law was necessary for the advantage of the republic, if it was of service to every individual, if it formed an easy communication between the debtor and the creditor, it could not be unjust.

He pays least, says Ulpian (a), who pays latest. This decides the question whether interest be lawful; that is, whether the creditor can sell time, and the debtor buy it.

BOOK XXIII.

Of Laws in the relation they bear to the number of Inhabitants.

CHAP. I.

Of Men and Animals with respect to the Multiplication of their Species.

DELIGHT of human kind, (a) and Gods above!
Parent of Rome, propitious queen of love!

* * * * *

For

† Turpissimæ legis auctor qua creditoribus quadrantem solvi jufferat. Lib. ii. Some authors have interpreted this passage, as if the law of Flaccus had ordained, that they should only pay a fourth of the principal; but, in my opinion, this was not the language of the Latin authors. When the question was in relation to the reducing of debts, they made use of the words quadrans, triens, &c. to signify the usury; and tertia pars, and quarta pars, to point out the capital. 2. They made the consul Valerius the author of a law, which would scarcely have been made by a seditious tribune. 3. This was in the heat of a civil war, at a time when it was necessary to maintain the public credit, not to destroy it; a civil war, in short, that had no relation to the abolition of debts,

(a) Leg. xii. ff. de verb. signif.

(a) Dryden's *Lucr.*

For when the rising spring adorns the mead,
 And a new scene of nature stands display'd ;
 When teeming buds, and cheerful greens appear,
 And western gales unlock the lazy year ;
 The joyous birds thy welcome first express,
 Whose native songs thy genial fire confers :
 Then savage beasts bound o'er their slighted food ;
 Struck with thy darts, and tempt the raging flood :
 All nature is thy gift, earth, air, and sea ;
 Of all that breathes the various progeny,
 Stung with delight, is goaded on by thee.
 O'er barren mountains, o'er the flow'ry plain,
 The leafy forest, and the liquid main,
 Extends thy uncontroll'd and boundless reign.
 Thro' all the living regions thou dost move,
 And scatter'st where thou go'st the kindly seeds of love.

The females of brutes have an almost constant fecundity. But in the human species, the manner of thinking, the character, the passions, the humour, the caprice, the idea of preserving beauty, the pain of child-bearing, and the fatigue of a too numerous family, obstruct propagation a thousand different ways.

CHAP. II.

Of Marriage.

THE natural obligation of the father to provide for his children has established marriage, which makes known the person who ought to fulfil this obligation. The people (a) mentioned by Pomponius Mela (b) had no other way of discovering him but by resemblance.

Among

(a) The Garamantes.

(b) Lib. 1. Chap. 8.

Among civilized nations the father * is that person on whom the laws, by the ceremony of marriage, have fixed this duty, because they find in him the man they want.

Amongst brutes this is an obligation which the mother can generally perform; but it is much more extensive amongst men. Their children indeed have reason; but this comes only by slow degrees. It is not sufficient to nourish them; we must also direct them: they can already live; but they cannot govern themselves.

Illicit conjunctions contribute but little to the propagation of the species. The father who is under a natural obligation to nourish and educate his children, is not here fixed; and the mother, with whom the obligation remains, finds a thousand obstacles from shame, remorse, the constraint of her sex, and the rigour of laws; and besides, she generally wants the means.

Women who have submitted to a public prostitution, cannot have the conveniency of educating their children; the trouble of education is incompatible with their station; and they are so corrupt, that they can have no protection from the law.

It follows from all this, that public continence is naturally connected with the propagation of the species.

CHAP. III.

Of the Condition of Children.

IT is a dictate of reason, that when there is a marriage, children should follow the station or condition of the father; and that when there is not, they can belong to the mother only*.

CHAP.

* Pater est quem nuptiæ demonstrant.

* For this reason, among nations that have slaves, the child almost always follows the station or condition of the mother.

CHAP. IV.

Of Families.

IT is almost every where a custom for the wife to pass into the family of the husband. The contrary is without any inconveniency established at Formosa (a), where the husband enters into the family of the wife.

This law, which fixes the family in a succession of persons of the same sex, greatly contributes, independently of the first motives, to the propagation of the human species. The family is a kind of property: a man who has children of a sex which does not perpetuate it, is never satisfied if he has not those who can render it perpetual.

Names, which give men an idea of a thing, which one would imagine ought not to perish, are extremely proper to inspire every family with a desire of extending its duration. There are people, amongst whom names distinguish families; there are others, where they only distinguish persons; these last have not the same advantage as the former.

CHAP. V.

Of the several Orders of Lawful Wives.

LAWS and religion sometimes establish many kinds of civil conjunctions: and this is the case amongst the Mahometans, where there are several orders of wives, the children of whom are acknowledged by being born in the house by civil contracts, or even by the slavery of the mother, and the subsequent gratitude of the father.

It:

(a) Du Halde, tom. 1. page 165,

It would be contrary to reason, that the law should stigmatize the children for what it approved in the father. All these children ought therefore to succeed, at least if some particular reason does not oppose it, as in Japan, where none succeed but the children of the wife given by the emperor. Their policy demands that the gifts of the emperor should not be too much divided, because they subject them to a kind of service like that of our ancient fiefs.

CHAP. VI.

Of Laws in Relation to Bastards.

IN republics, where it is necessary that there should be the purest morals, bastards ought to be more degraded than in monarchies.

The laws made against them at Rome were perhaps too severe. But as the ancient institutions laid all the citizens under a necessity of marrying; and as marriages were also softened by the permission to repudiate, or make a divorce; nothing but an extreme corruption of manners could lead them to concubinage.

It is observable, that as the quality of a citizen was a very considerable thing in a democratic government, where it carried with it the sovereign power, they frequently made laws in respect to the state of bastards, which had less relation to the thing itself, and to the honesty of marriage, than to the particular constitution of the republic. Thus the people have sometimes admitted bastards into the number (a) of citizens, in order to increase their power in opposition to the great. Thus the Athenians excluded bastards from the privilege of being citizens, that they might possess a greater share of the corn sent them by the

(a) Aristotle's Politics, lib. vi. cap. 4.

the King of Egypt. In fine, Aristotle informs us (b), that in many cities where there was not a sufficient number of citizens, their bastards succeeded to their possessions; and that when there was a proper number, they did not succeed.

CHAP. VII.

Of the Father's Consent to Marriage.

THE consent of fathers is founded on their authority, that is, on their right of property. It is also founded on their love, on their reason, and on the uncertainty of that of their children, whom youth confines in a state of ignorance, and passion in a state of ebriety.

In the small republics or singular institutions already mentioned, they might have laws which gave to magistrates that right of inspection over the marriages of the children of citizens, which nature had already given to fathers. The love of the public might there equal or surpass all other love. Thus Plato would have marriages regulated by the magistrates: this the Lacedæmonian magistrates performed.

But in common institutions, fathers have the disposal of their children in marriage: their prudence in this respect is always supposed to be superior to the prudence of a stranger. Nature gives to fathers a desire of procuring successors to their children when they have almost lost the desire of enjoyment themselves. In the several degrees of progeniture, they see themselves insensibly advancing to a kind of immortality. But what must be done if oppression and avarice arise to such a height as to usurp all the authority of fathers? Let us hear what Thomas Gage (a) says in regard to the conduct of the Spaniards in the West-Indies.

VOL. II.

L

" According

(b) Lib. iii. cap. 3.

(a) A new Survey of the West-Indies, by Thomas Gage, p. 345. 3d edit.

“ According to the number of the sons and daughters that
“ are marriageable, the father’s tribute is raised and increased,
“ until they provide husbands and wives for their sons and
“ daughters, who, as soon as they are married, are charged
“ with tribute ; which, that it may increase, they will suffer
“ none above fifteen years of age to live unmarried. Nay, the
“ set time of marriage appointed for the Indians, is at fourteen
“ years for the man, and thirteen for the woman, alledging
“ that they are sooner ripe for the fruit of wedlock, and sooner
“ ripe in knowledge and malice, and strength for work and
“ service, than any other people. Nay, sometimes they force
“ them to marry, who are scarce twelve and thirteen years of
“ age, if they find them well limbed and strong in body, ex-
“ plaining a point of one of the canons which alloweth four-
“ teen and fifteen years, *Nisi malitia suppleat ætatem.*” He saw a
list of these taken. It was, says he, a most shameful affair.
Thus, in an action which ought to be the most free, the Indians
are the greatest slaves.

In England, the law is frequently abused by the daughters marrying according to their own fancy, without consulting their parents. This custom is, I am apt to imagine, more tolerated there than any where else, from a consideration, that as the laws have not established a monastic celibacy, the daughters have no other state to chuse but that of marriage, and this they cannot refuse. In France, on the contrary, young women have always the resource of celibacy ; and therefore the law which ordains that they shall wait for the consent of their fathers, may be more agreeable. In this light, the custom of Italy and Spain must be less rational ; convents are there established, and yet they marry without the consent of their fathers.

CHAP. VIII.

Of Young Women.

YOUNG women who are conducted by marriage alone to liberty and pleasure ; who have a mind which dares not think, a heart which dares not feel, eyes which dare not see, ears which dare not hear, who appear only to shew themselves filly, condemned without intermission to trifles and precepts, have sufficient inducements to lead them on to marriage : it is the young men that want to be encouraged.

CHAP. IX.

What it is that determines to Marriage.

WHEREVER a place is found in which two persons can live commodiously, there they enter into marriage. Nature has a sufficient propensity to it, when unrestrained by the difficulty of subsistence.

A rising people increase and multiply extremely. This is, because with them it would be a great inconveniency to live in celibacy ; and none to have many children. The contrary of which is the case when a nation is formed.

CHAP. X.

Of the Severity of Government.

MEN who have absolutely nothing, such as beggars, have many children. This proceeds from their being in the case of a rising people : it costs the father nothing to give his art to his offspring, who even in their infancy are the instruments of this art. These people multiply in a rich or superstitious

stitious country, because they do not support the burden of society, but are themselves the burden. But men who are poor, only because they live under a severe government; who regard their fields less as the source of their subsistence, than as a cause of vexation; these men, I say, have few children: they have not even subsistence for themselves, how then can they think of dividing it? they are unable to take care of themselves when they are sick; how then can they attend to the wants of creatures whose infancy is a continual sickness?

It is pretended by some who are apt to talk of things which they have never examined, that the greater the poverty of the subjects, the more numerous are their families; that the more they are loaded with taxes, the more industriously they endeavour to put themselves in a station in which they will be able to pay them: two sophisms, which have always destroyed, and will for ever be the destruction of monarchies.

The severity of government may be carried to such an extreme, as to make the natural sentiments destructive of the natural sentiments themselves. Would the women of (a) America have refused to bear children, had their masters been less cruel?

CHAP. XL

Of the numbers of Males and Females in different Countries.

I HAVE already observed (b), that there are born in Europe rather more boys than girls. It has been remarked that in * Japan there are born rather more girls than boys: all things compared, there must be more fruitful women in Japan than in Europe, and consequently it must be more populous.

We

(a) A new Survey of the West-Indies, by Thomas Gage, p. 97. 3d edit.

(b) Book xvi. chap. 4.

* See Kempfer, who gives a computation of the people of Meaco.

We are informed (c), that at Bantam there are ten girls to one boy. A disproportion like this must cause the number of families there, to be to the number of those of other climates, as 1 to 5 one-half, which is a prodigious difference. Their families may be much larger indeed; but there must be few men in circumstances sufficient to provide for so large a family.

CHAP. XII.

Of Sea-port Towns.

IN sea-port towns, where men expose themselves to a thousand dangers, and go abroad to live or die in distant climates, there are fewer men than women: and yet we see more children there than in other places. This proceeds from the greater ease with which they procure the means of subsistence. Perhaps even the oily parts of fish are more proper to furnish that matter which contributes to generation. This may be one of the causes of the infinite number of people in † Japan and China ‡, where they live almost wholly on (d) fish. If this be the case, certain monastic rules, which oblige the monks to live on fish, must be contrary to the spirit of the legislator himself.

CHAP.

(c) Collection of Voyages that contributed to the establishment of the East India company, Vol. I. p. 347.

† Japan is composed of a number of isles, where there are many banks, and the sea is there extremely full of fish.

‡ China abounds in rivers.

(d) See Du Halde, tom. ii. p. 139. 142.

CHAP. XIII.

Of the Productions of the Earth which require a greater or a less number of Men.

PASTURE-lands are but little peopled, because they find employment only for a few. Corn-lands employ a great many men, and vineyards infinitely more.

It has been a frequent complaint in England ||, that the increase of pasture-land diminished the inhabitants; and it has been observed in France, that the prodigious number of vineyards is one of the great causes of the multitude of people.

Those countries where coal-pits furnish a proper substance for fuel, have this advantage over others, that not having the same occasion for forests, the lands may be cultivated.

In countries productive of rice, they are at great pains in watering the land; a great number of men must therefore be employed. Besides, there is less land required to furnish subsistence for a family, than in those which produce other kinds of grain. In fine, the land which is elsewhere employed in raising cattle, serves immediately for the subsistence of man; and the labour, which in other places is performed by cattle, is there performed by men; so that the culture of the soil becomes to man an immense manufacture.

CHAP.

|| The greatest number of the proprietors of land, says Bishop Burnet, finding more profit in selling their wool than their corn, inclosed their estates; the commons, ready to perish with hunger, rose up in arms; they insisted on a division of the lands; the young King even wrote on this subject. And proclamations were made against those who inclosed their lands. Abridgment of the History of the Reformation.

CHAP. XIV.

Of the Number of Inhabitants with relation to the Arts.

WHEN there is an Agrarian law, and the lands are equally divided, the country may be extremely well peopled, though there are but few arts; because every citizen receives from the cultivation of his land whatever is necessary for his subsistence, and all the citizens together consume all the fruits of the earth. Thus it was in some republics.

In our present situation, in which lands are so unequally distributed, they produce much more than those who cultivate them can consume; if the arts therefore should be neglected, and nothing minded but agriculture, the country could not be peopled. Those who cultivate having corn to spare, nothing would engage them to work the following year; the fruits of the earth would not be consumed by the indolent; for these would have nothing with which they could purchase them. It is necessary then that the arts should be established, in order that the produce of the land may be consumed by the labourer and the artificer. In a word, it is now proper that many should cultivate much more than is necessary for their own use. For this purpose, they must have a desire of enjoying superfluities; and these they can receive only from the artificer.

Those machines which are designed to abridge art, are not always useful. If a piece of workmanship is of a moderate price, such as is equally agreeable to the maker and the buyer, those machines which render the manufacture more simple, or in other words, diminish the number of workmen, would be pernicious. And if water-mills were not every where established, I should not have believed them so useful as it is pretended, because they have deprived an infinite multitude of their employment, a vast number of persons of the use of water, and the greatest part of the land of its fertility.

CHAP.

CHAP. XV.

The concern of the Legislator in the Propagation of the Species.

REGULATIONS on the number of citizens depend greatly on circumstances. There are countries in which nature does all: the legislator then can do nothing. What need is there of inducing men by laws to propagation, when a fruitful climate yields a sufficient number of inhabitants? Sometimes the climate is more favourable than the soil; the people multiply, and are destroyed by famine: this is the case of China. Hence a father sells his daughters, and exposes his children. In Tonquin (a), the same causes produce the same effects; so we need not, like the Arabian travellers mentioned by Renaudot, search for the origin of this in their sentiments (b) on the *Métempsychofis*.

For the same reason, the religion of the isle of Formosa (c) does not suffer the women to bring their children into the world, till they are thirty-five years of age: the priestesses before this age, by bruising the belly, procure abortion.

CHAP. XVI.

Of Greece, and the number of its Inhabitants.

THAT effect which in certain countries of the east springs from physical causes, was produced in Greece by the nature of the government. The Greeks were a great nation, composed of cities, each of which had a distinct government and separate laws. They had no more the spirit of conquest and

(a) Dampiere's Voyages, Vol. II. p. 41.

(b) Ibid. p. 167.

(c) See the collection of Voyages that contributed to the establishment of the East India company. Vol. I. part. 1. p. 182. and 188.

and ambition, than those of Switzerland, Holland, and Germany, have at this day. In every republic the legislator had in view the happiness of the citizens at home, and their power abroad, lest it should prove inferior * to that of the neighbouring cities. Thus, with the enjoyment of a small territory and great happiness, it was easy for the number of the citizens to increase to such a degree as to become burdensome. This obliged them incessantly to send out colonies; and, as the Swiss do now, to let their men out to war. Nothing was neglected that could hinder the too great multiplication of children.

They had amongst them republics, whose constitution was very remarkable. The nations they had subdued, were obliged to provide subsistence for the citizens. The Lacedæmonians were fed by the Helotes, the Cretans by the Periecians, and the Thessalians by the Penestes. They were obliged to have only a certain number of freemen, that their slaves might be able to furnish them with subsistence. It is a received maxim in our days, that it is necessary to limit the number of regular troops: now the Lacedæmonians were an army, maintained by the peasants; it was proper, therefore, that this army should be limited; without this the freemen, who had all the advantages of society, would increase beyond numbers, and the labourers be overloaded.

The politics of the Greeks were particularly employed in regulating the number of citizens. Plato in his republic fixes them at five thousand and forty, and he would have them stop or encourage propagation, as was most convenient, by honours, shame, and the advice of the old men; he would even (a) regulate the number of marriages in such a manner, that the republic might be recruited without being overcharged.

If the laws of a country, says Aristotle (b), forbid the exposing of children, the number of those brought forth ought

VOL. II.

M

to

* In valour, discipline, and military exercises.

(a) Republic lib. v.

(b) Polit. Lib. vii. Chap. 16.

to be limited. If they have more than the number prescribed by law, he advises (c) to make the women miscarry before the foetus be formed.

The same author mentions the infamous means made use of by the Cretans, to prevent their having too great a number of children; a proceeding too indecent to repeat.

There are places, says Aristotle (d) again, where the laws give bastards the privilege of being citizens; but as soon as they have a sufficient number of people, this privilege ceases. The savages of Canada burn their prisoners, but when they have empty cottages to give them, they receive them into their nation.

Sir William Petty, in his calculations, supposes that a man in England is worth what he would sell for at Algiers *. This can be true only with respect to England. There are countries where a man is worth nothing; there are others where he is worth less than nothing.

CHAP. XVII.

Of the State and number of People before the Romans.

ITALY, Sicily, Asia Minor, Gaul and Germany, were nearly in the same state as Greece: full of small nations that abounded with inhabitants; they had no need of laws to increase their number.

CHAP. XVIII.

Of the Depopulation of the Universe.

ALL these little republics were swallowed up in a large one, and the universe insensibly became depopulated: in order to

(c) Ibid.

* Sixty pounds Sterling.

(d) Polit. Lib. iii. Chap. 3.

to be convinced of this, we need only consider the state of Italy and Greece, before and after the victories of the Romans.

"You will ask me, says Livy (a), where the Volsci could find soldiers to support the war, after having been so often defeated. There must have been formerly an infinite number of people in those countries, which at present would be little better than a desert, were it not for a few soldiers and Roman slaves."

"The oracles have ceased, says Plutarch, because the places where they spoke are destroyed. At present we can scarcely find in Greece three thousand men fit to bear arms."

"I shall not describe, says Strabo (b), Epirus and the adjacent places; because these countries are entirely deserted. This depopulation, which began long ago, still continues; so that the Roman soldiers encamp in the houses they have abandoned." We find the cause of this in Polybius, who says, that Paulus Æmilius, after his victory, destroyed threescore and ten cities of Epirus, and carried away an hundred and fifty thousand slaves.

CHAP. XIX.

That the Romans were under a necessity of making Laws to encourage the Propagation of the Species.

THE Romans, by destroying others, were themselves destroyed; incessantly in action, in the heat of battle, and in the most violent attempts, they wore out like a weapon kept constantly in use.

I shall not here speak of the attention with which they applied themselves to procure * citizens in the room of those they lost,

M 2

(a) Lib. vi.

(b) Lib. vii. p. 496.

* A modern author has treated of this in his considerations on the causes of the rise and declension of the Roman grandeur.

lost, of the associations they entered into, the privileges they bestowed, and of that immense nursery of citizens their slaves. I shall mention what they did to recruit the number, not of their citizens, but of their men; and as they were the people in the world who knew best how to adapt their laws to their projects, an examination of what they did in this respect cannot be a matter of indifference.

CHAP. XX.

Of the Laws of the Romans relating to the Propagation of the Species.

THE antient laws of Rome endeavoured greatly to incite the citizens to marriage. The senate and the people made frequent regulations on this subject, as Augustus says in his speech related by Dio (c).

Dionysius Halicarnassæus (d) cannot believe, that after the death of three hundred and five of the Fabii, exterminated by the Veientes, there remained no more of this family but one single child; because the antient law, which obliged every citizen to marry and to educate all his children, was † still in force.

Independently of the laws, the censores had a particular eye upon marriages, and according to the exigencies of the republic, engaged them to it by ‡ shame and by punishment.

The corruption of manners that began to take place, contributed vastly to disgust the citizens against marriage, which was painful to those who had no taste for the pleasures of innocence. This is the purport of that speech (e) which Metellus Numidicus when he was the censor made to the people: " If
" it

(c) Lib. 36.

(d) Lib. 2.

† In the year of Rome 277.

‡ See what has been done in this respect in T. Livy, lib. 45. The Epitome of T. Livy, lib. 59. Aulus Gellius, lib. 1. c. 6. Valerius Maximus, lib. 2. c. 19.

(e) It is in Aulus Gellius, Lib. 1. c. 6.

" it was possible for us to do without wives, we should deliver
 " ourselves from this evil; but as nature has ordained that we
 " cannot live very happily with them, nor subsist without
 " them, we ought to have more regard to our own preservation,
 " than to transient gratifications."

The corruption of manners destroyed the censorship, which was itself established to destroy corruption of manners; for when this corruption became general, the censor lost his power (f).

Civil discords, triumvirates, and proscriptions, weakened Rome more than any war she had hitherto engaged in. They left but few citizens, and the greatest part of them unmarried. To remedy this last evil, Cæsar and Augustus re-established the censorship, and would even be (g) censors themselves. Cæsar gave (h) rewards to those who had many children. All (i) women under forty-five years of age, who had neither husband nor children, were forbid to wear jewels, or to ride in litters; an excellent method thus to attack celibacy by the power of vanity. The laws of Augustus (k) were more pressing; he imposed (l) new penalties on those who were not married, and increased the reward both of those who were married and of those who had children. Tacitus calls these Julian laws (m); to all appearance they were founded on the antient regulations made by the senate, the people, and the censors.

The laws of Augustus met with innumerable obstacles, and thirty-four years (n) after it had been made, the Roman knights insisted on its being abolished. He placed on one side those who were married, and on the other those who were not; these last appeared by far the greatest number; upon which the citizens

(f) See what I have said in book 5. c. 19.

(g) See Dio, Lib. 43. and Xiphilinus in August.

(h) Dio, Lib. 43. Suetonius, Life of Cæsar, Chap. 20. Appian, Lib. 2. of the civil war.

(i) Eusebius in his chronicle.

(k) Dio, Lib. 54.

(l) In the year of Rome 736.

(m) Julian rogationes, Annal. Lib. 3.

(n) In the year of Rome 762. Dio, Lib. 56.

tizens were astonished and confounded. Augustus, with the gravity of the antient censors, addressed them in this manner † :

“ While sickness and war snatch away so many citizens,
 “ what must become of the city if marriages are no longer
 “ contracted? The city does not consist of houses, of porticos,
 “ of public places: men alone constitute a city. You do not
 “ see men, like those mentioned in fable, arising out of the
 “ earth to take care of your affairs. Your celibacy is not
 “ owing to the desire of living alone; every one of you have
 “ both table and bed companions. You only seek to enjoy
 “ your irregularities undisturbed. Do you here cite the ex-
 “ ample of the vestal virgins? if you preserve not the laws of
 “ chastity, you ought to be punished like them. You are
 “ equally bad citizens, whether your example has an influence
 “ on the rest of the world, or whether it be disregarded. My
 “ only view is the perpetuity of the republic. I have increas-
 “ ed the penalties of those who have disobeyed; and with re-
 “ spect to rewards, they are such, as I do not know whether
 “ virtue has ever received greater. For less will a thousand
 “ men expose life itself, and yet will not these engage you to
 “ take a wife, and provide for children?”

He made a law, which was called after his name *Julia*, and *Papia Poppæa*, from the names of the consuls (b) for part of that year. The greatness of the evil appeared, even in their being elected: Dio (c) tells us, that they were not married, and that they had no children.

This law of Augustus was properly a code of laws, and a systematic body of all the regulations that could be made on this subject. The Julian * laws were incorporated into it; and received a greater strength. It was so extensive in its use, and had

† I have abridged this speech, which is of a tedious length; it is to be found in Dio, lib. 56.

(b) Marcus Papilius Mutius, and Q. Poppæus Sabinus, Dio, Lib. lvi. (c) Ibid.

* The 14th title of the fragments of Ulpian distinguishes very rightly between the Julian and the Papian law.

had an influence on so many things, that it formed the finest part of the civil law of the Romans.

We find † parts of it dispersed in the precious fragments of Ulpian, in the laws of the Digest, collected from authors who wrote on the Papian laws, in the historians and others who have cited them, in the Theodosian code which abolished them, and in the works of the fathers who have censured them, without doubt from a laudable zeal for the things of the other life, but with very little knowledge of the affairs of this.

These laws had many heads ‡, of which we know thirty-five. But to return to my subject as speedily as possible, I shall begin with that head, which Aulus Gellius (a) informs us was the seventh, and which relates to the honours and rewards granted by that law.

The Romans, who for the most part sprung from the cities of the Latins, which were Lacedæmonian (b) colonies, and who had received a part of their laws even from those cities ||, had, like the Lacedæmonians, such veneration for old age, as to give it all honour and precedency. When the republic wanted citizens, they granted to marriage, and to a number of children, the privileges which had been given to age (c). They granted some to marriage alone, independently of the children which might spring from it; this was called the right of husbands. They gave others to those who had any children, and larger still to those who had three children. These three things must not be confounded. These last had those privileges which married men constantly enjoyed, as, for example, a particular place in the theatre (d); they had those which could only be enjoyed by

† James Godfrey has made a collection of these.

‡ The 35th is cited in the 19th law ff. de ritu nuptiarum.

(a) Lib. 2. chap. 15.

(b) Dionys. Halicarnassæus.

|| The deputies of Rome, who were sent to search into the laws of Greece, went to Athens and to the cities of Italy.

(c) Aulus Gellius, Lib. 2. cap. 15.

(d) Suetonius in Augusto, chap. 44.

by men who had children ; and which none could deprive them of but those who had a greater number.

These privileges were very extensive. The married men who had the most children, were always preferred *, whether in the pursuit, or in the exercise of honours. The consul, who had the most numerous offspring, was the (b) first who received the fasces ; he had his choice of the (c) provinces ; the senator who had most children, had his name wrote first in the catalogue of senators, and was the first in giving his opinion (d) in the senate. They might even stand sooner than ordinary for an office, because every child gave a dispensation of a year (e). If an inhabitant of Rome had three children, he was exempted from all troublesome offices (f). The free born women who had three children, and the freed women who had four, passed (g) out of that perpetual tutelage, in which they had been held (h) by the ancient laws of Rome.

As they had rewards, so they had also penalties †. Those who were not married could receive no advantage from the will of any person that was not a near relation ‡ ; and those who being married had no children, could receive only half §. The Romans, says Plutarch §, marry to *be* heirs, and not to *have* them.

The

* Tacitus, lib. 3. Ut numerus liberorum in candidatis præpolleret, quod lex jubeat.

(b) Aulus Gellius, lib. 2. cap. 15.

(c) Tacitus Annal. lib. 15.

(d) See Law 6. §. 3. de Decurion.

(e) See Law 2. ff. de Minorib.

(f) Law 1st and 2d. ff. de vacatione & excusat. munerum.

(g) Fragm. of Ulpian, tit. 29. §. 3.

(h) Plutarch, Life of Numa.

† See the fragments of Ulpian, tit. 14, 15, 16, 17, and 18, which compose one of the finest pieces of the ancient civil law of the Romans.

‡ Sozom. lib. 1. cap. 9. they could receive from their relations. Fragm. of Ulpian, tit. 16. §. 1.

§ Sozom. lib. 1. cap. 9. & leg. unic. cod. Theod. de infirm. pœni cælib. & orbit.

§ Moral works, of the love of fathers towards their children.

The advantages which a man and his wife might receive from each other * by will, were limited by law. If they had children of each other, they might receive the whole; if not, they could receive only a tenth part of the succession on the account of marriage; and if they had children by a former marriage, as many tenths as they had children.

If a husband absented himself (a) from his wife on any other cause than the affairs of the republic, he could not inherit from her.

The law gave to a surviving husband or wife two years † to marry again, and a year and a half in case of a divorce. The fathers who would not suffer their children to marry, or refused to give their daughters a portion, were obliged to do it by the magistrates ‡.

They were not allowed to betrothe, when the marriage was to be deferred for more than two years (b); and as they could not marry a girl till she was twelve years old, they could not be betrothed to her till she was ten. The laws would not suffer them to trifle (c) to no purpose; and under a pretence of being betrothed, to enjoy the privileges of married men.

It was contrary to law for a man of sixty to (d) marry a woman of fifty. As they had given great privileges to married men, the law would not suffer them to enter into useless marriages. For the same reason, the Calvisian *Senatus-consultum* declared the marriage of a woman above fifty with a man less

VOL. II.

N

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* See a more particular account of this in the *Fragm. of Ulpian*, tit. 15. and 16.

(a) *Fragment of Ulpian*, tit. 16. §. 1.

† *Fragment of Ulpian*, tit. 14. It seems the first Julian laws allowed three years: *Speech of Augustus in Dio*, lib. lvi. *Suetonius*, life of Augustus, cap. 34. Other Julian laws granted but one year: the *Papian law* gave two. *Fragment of Ulpian*, tit. 14. These laws were not agreeable to the people; Augustus therefore softened or strengthened them, as they were more or less disposed to comply with them.

‡ This was the 35th head of the *Papian law*. *Leg. 19. ff. de ritu nuptiarum*.

(b) See *Dio*, lib. liv. anno 736. *Suetonius in Octavio*, cap. 34.

(c) *Dio lib. liv.* and in the same *Dio* the *speech of Augustus lib. lvi.*

(d) *Fragment of Ulpian*, tit. 16. and the 27th law *Cod. de nuptiis*.

than sixty, to be (e) unequal; so that a woman of fifty years of age could not marry, without incurring the penalties of these laws. Tiberius added (a) to the rigour of the Papian law, and prohibited men of sixty from marrying women under fifty; so that a man of sixty could not marry in any case whatsoever, without incurring the penalty. But Claudius abrogated (b) this law made under Tiberius.

All these regulations were more conformable to the climate of Italy than to that of the North, where a man of sixty years of age has still a considerable degree of strength; and where women of fifty are not always past child-bearing.

That they might not be unnecessarily limited in the choice they were to make, Augustus permitted all the free-born citizens who were not senators (c) to marry freed-women (d). The Papian (e) law forbade the senators marrying freed-women, or those who had been brought up to the stage; and from the time of (f) Ulpian, free-born persons were forbid to marry women who had led a disorderly life, who had played in the theatre, or who had been condemned by a public sentence. This must have been established by a decree of the senate. During the time of the republic they had never made laws like these, because the censors corrected this kind of disorders as soon as they arose, or else prevented their rising.

Constantine (g) made a law, in which he comprehended in the prohibition of the Papian law, not only the senators, but even those who had a considerable rank in the state, without mentioning

(e) Fragment of Ulpian, tit. 16. §. 3.

(a) See Suetonius in Claudio, cap. 23.

(b) See Suetonius, life of Claudius, cap. 23. and the Fragment of Ulpian, tit. 16. §. 3.

(c) Dio lib. liv. Fragment of Ulpian tit. 13.

(d) Augustus's speech in Dio lib. lvi.

(e) Fragment of Ulpian, chap. 13. and the 44th law ff. de ritu nuptiarum

(f) Fragment of Ulpian, tit. 13. and 16.

(g) See law 1. in cod. de natur.

mentioning persons in an inferior station : this constituted the law of those times. These marriages were therefore no longer forbidden, but to the free-born comprehended in the law of Constantine. Justinian (h) however abrogated the law of Constantine, and permitted all sorts of persons to contract these marriages : and by this means we have acquired so fatal a liberty.

It is evident, that the penalties inflicted on those who married contrary to the prohibition of the law, were the same as those inflicted on persons who did not marry. These marriages did not give them any civil advantage (a) ; and the dowry (b) was confiscated (c) after the death of the wife.

Augustus having adjudged the succession and legacies of those whom these laws had declared incapable to the public treasury *, they had the appearance rather of fiscal, than of political and civil laws. The disgust they had already conceived at a burden which appeared too heavy, was increased by their seeing themselves a continual prey to the avidity of the treasury. On this account, it became necessary under Tiberius that † these laws should be softened, that Nero should lessen the rewards given out of the treasury to the ‡ informers, that Trajan (d) should put a stop to their plundering, that Severus § should also moderate these laws, and that the civilians should consider them as odious, and in all their decisions deviate from the literal rigour.

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Besides

(h) Novel. 177.

(a) Law 37. ff. de operib. liberorum §. 7. Fragment of Ulpian, tit. 16. §. 2.

(b) Fragment of Ulpian, tit. 16. §. 2.

(c) See book 26. c. 13.

* Except in certain cases. See the Fragm. of Ulpian, tit. 18. and the only law in Cod. de Caduc. tollend.

† Relatum de moderanda Papia Poppæa. Tacit. Annal. lib. iii. page 117.

‡ He reduced them to the fourth part. Suetonius in Nerone, cap. 10.

§ Severus extended even to twenty-five years for the males, and to twenty for the females, the time fixed by the Papian law, as we see by comparing the Fragment of Ulpian, tit. 16, with what Tertullian says, Apol. cap. 4.

(d) See Pliny's panegyric.

Besides, the emperors enervated § these laws, by the privileges they gave, of the rights of husbands, of children, and of three children. They did more than this; they gave (e) particular persons a dispensation from the penalties of these laws. But regulations established for the public utility seemed incapable of admitting an alleviation.

It was highly reasonable that they should grant the rights of children to the vestals *, whom religion retained in a necessary virginity: they gave in the same manner the privilege of † married men to soldiers, because they could not marry. It was customary to exempt the emperors from the constraint of certain civil laws. Thus Augustus was freed from the constraint of the law which limited the power of (a) enfranchising, and of that which set bounds to the right of (b) bequeathing by testament. These were only particular cases: but at last dispensations were given without discretion, and the rule itself became no more than an exception.

The sects of philosophers had already introduced in the empire a disposition that estranged them from business; a disposition which could not gain ground in the time of the || republic, when every body was employed in the arts of war and peace. From hence arose an idea of perfection, as connected with a life of speculation; from hence an estrangement from the cares and embarrassments of a family. The christian religion coming after
this

§ P. Scipio, the censor, complains in his speech to the people of the abuses which were already introduced, that they received the same privileges for adopted as for natural children. Aulus Gellius, lib. v. cap. 19.

(e) See the 31st Law de ritu nuptiarum.

* Augustus, in the Papian law, gave them the privilege of mothers, See Dio. lib. lvi. Numa had given them the ancient privilege of women who had three children, that is, of having no guardian. Plutarch, life of Numa.

† This was granted them by Claudius. Dio. lib. lx.

(a) Leg. apud eum, ff. de manumissionib us, §, 1.

(b) Dio lib. lv.

|| See in Cicero's Offices his sentiments on this spirit of speculation.

this philosophy, fixed, if I may make use of the expression, the ideas which that had only prepared.

Christianity stamped its character on jurisprudence; for empire has always a connexion with the priesthood. This is visible from the Theodosian code, which is only a collection of the decrees of the Christian emperors.

A panegyrist (a) of Constantine says to that emperor, "Your laws were made only to correct vice, and to regulate manners: you have stripped the antient laws of that artifice, which seemed to have no other aim than to lay snares for simplicity."

It is certain that the alterations made by Constantine took their rise, either from sentiments relating to the establishment of christianity, or from ideas conceived of its perfection. From the first proceeded those laws which gave such authority to bishops, and which have been the foundation of the ecclesiastical jurisdiction: from hence those laws which weakened paternal authority (b), by depriving the father of his property in the possessions of his children. To extend a new religion, they were obliged to take away the dependence of children, who are always least attached to what is already established.

The laws made with a view to Christian perfection, were more particularly those by which the (c) penalties of the Papian laws were abolished; those who were not married were equally exempted from them, with those who being married had no children.

"These laws were established, says an ecclesiastic (d) historian, as if the multiplication of the human species was an effect of our care; instead of being sensible that the number is increased or diminished, according to the order of providence."

Principles of religion have had an extraordinary influence on the

(a) Nazarius in Panegyrico Constantini, anno 321.

(b) See Law 1, 2, 3. in the Theodosian code, de bonis maternis maternique generis, &c. and the only law in the same code de bonis qui filiis famuli acquiruntur.

(c) Leg. unic. code Theod. de infirm. cælib. & orbit.

(d) Sozomenus, page 27,

the propagation of the human species. Sometimes they have promoted it, as among the Jews, the Mahometans, the Gaurs, and the Chinese; at others, they have put a damp to it, as was the case of the Romans upon their conversion to Christianity.

They every where incessantly preached up continency: a virtue the more perfect, because in its own nature it can be practised but by very few.

Constantine had not taken away the decimal laws, which granted a greater extent to the donations between man and wife in proportion to the number of their children: Theodosius the younger (a) abrogated even these laws.

Justinian declared all those marriages (b) valid, which had been prohibited by the Papian laws. These laws required people to marry again: Justinian granted (c) privileges to those who did not marry again.

By the ancient laws, the natural right which every one had to marry, and beget children, could not be taken away. Thus when they received a (d) legacy on condition of not marrying, or when a patron made his (e) freed-man swear, that he would neither marry nor beget children, the Papian law annulled both the (f) condition and the oath. The clauses, *on continuing in widowhood*, established amongst us, contradict the ancient law, and descend from the constitutions of the emperors, founded on ideas of perfection.

There is no law that contains an express abrogation of the privileges and honours which the Romans had granted to marriages, and to a number of children. But where celibacy had the pre-eminence, marriage could not be held in honour; and since they could oblige the officers of the public revenue to renounce so many advantages by the abolition of the penalties, it is easy to perceive that with greater ease they might put a stop to the rewards.

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(a) Leg. 2, & 3. cod. Theod. de jur. liber.

(b) Leg. Sancimus, code de nuptiis.

(c) Novell. 127, cap. 3. Novell. 118, cap. 5.

(d) Leg. 54, ff. de condit. & demonstr.

(e) Leg. 5, §. de jure patronatus.

(f) Paul in his sentences, lib. iii. tit. 4. § 15.

The same spiritual reason which had permitted celibacy, soon imposed it even as necessary. God forbid that I should here speak against celibacy, as adopted by religion: but who can be silent, when this is built on libertinism; when the two sexes corrupting each other, even by the natural sensations themselves, fly from an union which ought to make them better, to live in that which always renders them worse?

It is a rule drawn from nature, that the more the number of marriages is diminished, the more corrupt are those who have entered into that state: the fewer married men, the less fidelity is there in marriage; as when there are more thieves, there are more thefts.

CHAP. XXI.

Of the Exposing of Children.

THE Roman policy was very good, in respect to the exposing of children. Romulus, says Dionysius Halicarnassæus (a), laid the citizens under an obligation to educate all their male children, and the eldest of their daughters. If the infants were deformed and monstrous, he permitted the exposing them, after having shewn them to five of their nearest neighbours.

Romulus did not suffer (b) them to kill any infant under three years old: by this means he reconciled the law which gave to fathers the right over their children of life and death, with that which prohibited their being exposed.

We find also in Dionysius Halicarnassæus (c), that the law which obliged the citizens to marry, and to educate all their children, was in force in the 277th year of Rome: we see that custom had restrained the law of Romulus, which permitted them to expose their younger daughters.

We

(a) Antiquities of Rome lib. ii.

(b) Ibid.

(c) Lib. ix.

We have no knowledge of what the law of the twelve tables (made in the year of Rome 301), appointed with respect to the exposing of children, except from a passage of Cicero (d), who, speaking of the office of tribune of the people, says, that soon after its birth, like the monstrous infant of the law of the twelve tables, it was stifled: the infant that was not monstrous was therefore preserved, and the law of the twelve tables made no alteration in the preceding institutions.

"The Germans, says Tacitus (e), never expose their children; amongst them the best manners have more force than in other places the best laws." The Romans had therefore laws against this custom, and yet they did not follow them. We find not any * Roman law, that permitted the exposing of children: this was, without doubt, an abuse introduced towards the decline of the republic, when luxury robbed them of their freedom, when wealth divided was called poverty, when the father believed that all was lost which was given to his family, and when this family was distinct from his property.

CHAP. XXII.

Of the state of the Universe after the destruction of the ROMANS.

THE regulations made by the Romans to increase the number of their citizens, had their effect, while the republic, in the full vigour of its constitution, had nothing to repair but the losses they sustained by their courage, by their intrepidity, their firmness, their love of glory, and of virtue. But soon the wisest laws could not re-establish what a dying republic, what a general anarchy, what a military government, what a rigid empire, what a proud despotic power, what a feeble monarchy, what

(d) Lib. iii. de legib.

(e) De morib. German.

* There is not any title on this subject in the Digest; the title of the code says nothing of it, no more than the novels.

what a stupid, weak, and superstitious court had successively pulled down. It might indeed be said, that they conquered the world only to weaken it, and to deliver it up defenceless to barbarians. The Gothic nations, the Getes, the Saracens, and Tartars, by turns harrassed them : soon the barbarians had none to destroy but barbarians. Thus, in fabulous times, after the inundations and the deluge, there arose out of the earth armed men, who exterminated one another.

CHAP. XXIII.

The Changes which happened in EUROPE, with regard to the number of the Inhabitants.

IN the state Europe was in, one would not imagine it possible for it to be retrieved ; especially when under Charlemagne it formed only one vast empire. But by the nature of government at that time, it became divided into an infinite number of petty sovereignties ; and as the lord or sovereign who resided in his village, or city, was neither great, rich, powerful, nor even safe, but by the number of his subjects, every one employed himself with a singular attention to make his little country flourish. This succeeded in such a manner, that notwithstanding the irregularities of government, the want of that knowledge which has since been acquired in commerce, and the numerous wars and disorders incessantly arising, most countries of Europe were better peopled in those days than they are even at present.

I have not time to treat fully of this subject. But I shall cite the prodigious armies engaged in the Crusades, composed of men of all countries. Puffendorff (a) says, that in the reign of Charles the IX. there were in France twenty millions of men.

It is the perpetual re-union of many little states that has produced

VOL. II.

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(a) Introduction to the History of Europe, chap 5. of France.

duced this diminution. Formerly every village of France was a capital ; there is at present only one large one : every part of the state was a center of power ; at present all has a relation to one center ; and this center is, in some measure, the state itself.

Europe, it is true, has for these two ages past greatly increased its navigation : This has both procured and deprived it of inhabitants. Holland sends every year a great number of mariners to the Indies, of whom not above two thirds return : the rest either perish or settle in the Indies. The same thing must happen to every other nation engaged in that trade.

We must not judge of Europe as of a particular state engaged alone in an extensive navigation. This state would increase in people, because all the neighbouring nations would endeavour to have a share in this commerce ; and mariners would arrive from all parts. Europe separated from the rest of the world by religion *, by vast seas, and deserts, cannot be repaired in this manner.

CHAP. XXIV.

Consequences.

FROM all this we may conclude, that Europe is at present in a condition to require laws to be made in favour of the propagation of the human species. The politics of the ancient Greeks incessantly complain of the inconveniencies that attend a republic from the excessive number of citizens ; but the politics of this age call upon us to take proper means to increase ours.

CHAP.

* Mahometan countries surround it almost on every side.

CHAP. XXV.

Of the Law made in FRANCE to encourage the Propagation of the Species.

LEWIS XIV. appointed (a) particular pensions to those who had ten children, and much larger to those who had twelve. But it is not sufficient to reward prodigies. In order to communicate a general spirit which leads to the propagation of the species, it is necessary for us to establish, like the Romans, general rewards, or general penalties.

CHAP. XXVI.

By what means we may remedy a Depopulation.

WHEN a state is depopulated by particular accidents, by wars, pestilence, or famine, there are still resources left. The men who remain may preserve the spirit of industry; they may seek to repair their misfortunes, and calamity itself may make them become more industrious. The evil is almost incurable, when the depopulation is prepared before-hand by interior vice and a bad government. When this is the case, men perish with an insensible and habitual sickness: born in misery and languishing in weakness, in violence, or under the influence of a wicked administration, they see themselves destroyed, and frequently without perceiving the cause of their destruction. Of this we have a melancholy proof, in the countries desolated by despotic power, or by the excessive advantages of the clergy over the laity.

In vain shall we wait for the succour of children yet unborn, to re-establish a state thus depopulated. There is not

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(a) The edict of 1666, in favour of marriages,

time for this ; men in their solitude are without courage or industry. Without land sufficient to nourish a people, they have scarcely enough to nourish a family. The common people have not even a property in the miseries of the country, that is, in the fallows with which it abounds. The clergy, the prince, the cities, the great men, and some of the principal citizens, insensibly become proprietors of all the land, which lies uncultivated : the families who are ruined have left their fields ; and the labouring man is destitute.

In this situation they should take the same measures throughout the whole extent of the empire, which the Romans took in a part of theirs : they should practise in their distress, what those observed in the midst of plenty ; that is, they should distribute land to all the families who are in want, and procure them the materials for clearing and cultivating it. This distribution ought to be continued as long as there is a man to receive it ; and in such a manner, as not to lose a moment that can be industriously employed.

CHAP. XXVII.

Of Hospitals.

A MAN is not poor because he has nothing, but because he does not work. The man who without any degree of wealth has an employment, is as much at his ease as he who without labour has an income of a hundred crowns a-year. He who has no substance, and yet has a trade, is not poorer than he who possessing ten acres of land is obliged to cultivate it for his subsistence. The mechanic who gives his art as an inheritance to his children, has left them a fortune which is multiplied in proportion to their number. It is not so with him, who having ten acres of land, divides it amongst his children.

In trading countries, where many men have no other subsistence but from the arts, the state is frequently obliged to supply

supply the necessities of the aged, the sick, and the orphan: A well regulated government draws this support from the arts themselves. It gives to some such employment as they are capable of performing; others are taught to work, and this teaching of itself becomes an employment.

Those alms which are given to a naked man in the streets do not fulfil the obligations of the state, which owes to every citizen a certain subsistence, a proper nourishment, convenient cloathing, and a kind of life not incompatible with health.

Aurengzebe (a) being asked, why he did not build hospitals, said, "I will make my empire so rich, that there shall be no need of hospitals." He ought to have said, I will begin by rendering my empire rich, and then I will build hospitals.

The riches of a state suppose great industry. Amidst the numerous branches of trade, it is impossible but some must suffer; and consequently the mechanics must be in a momentary necessity.

Whenever this happens, the state is obliged to lend them a ready assistance; whether it be to prevent the sufferings of the people, or to avoid a rebellion. In this case hospitals, or some equivalent regulations, are necessary to prevent this misery.

But when the nation is poor, private property springs from the general calamity; and is, if I may so express myself, the general calamity itself. All the hospitals in the world cannot cure this private poverty: on the contrary, the spirit of indolence, which it constantly inspires, increases the general, and consequently the private misery.

Henry VIII. (b) resolving to reform the church of England, ruined the monks, of themselves a lazy set of people, that encouraged laziness in others; because, as they practised hospitality, an infinite number of idle persons, gentlemen and citizens, spent

(a) See Sir John Chardin's Travels through Persia, Vol. 8.

(b) See Burnet's History of the Reformation.

spent their lives in running from convent to convent. He demolished even the hospitals in which the lower people found subsistence, as the gentlemen did theirs in the monasteries. Since these changes, the spirit of trade and industry has been established in England.

At Rome, the hospitals place every one at his ease, except those who labour, except those who are industrious, except those who have land, except those who are engaged in trade.

I have observed, that wealthy nations have need of hospitals, because fortune subjects them to a thousand accidents; but it is plain that transient assistance is much better than perpetual foundations. The evil is momentary; it is necessary, therefore, that the succour should be of the same nature, and that it be applied to particular accidents.

BOOK XXIV.

Of Laws as relative to Religion, considered in itself, and in its Doctrines.

CHAP. I.

Of Religion in general.

AS amidst several degrees of darkness we may form a judgment of those which are the least thick, and among precipices, which are the least deep; so we may search among false religions for those that are most conformable to the welfare of society; for those, which, though they have not the effect of leading men to the felicity of another life, may contribute most to their happiness in this.

I shall examine therefore the several religions of the world in relation only to the good they produce in civil society; whether

whether I speak of that which has its root in heaven, or of those which spring from the earth.

As in this work I am not a divine, but a political writer, I may here advance things which are no otherwise true, than as they correspond with a worldly manner of thinking, not as considered in their relation to truths of a more sublime nature.

A person of the least degree of impartiality must see that I have never pretended to make the interests of religion submit to those of a political nature, but rather to unite them: now, in order to unite, it is necessary that we should know them.

The Christian religion, which ordains that men should love each other, would without doubt have every nation blest with the best civil, the best political laws; because these, next to this religion, are the greatest good that men can give and receive.

CHAP. II.

A Paradox of Mr Bayle's.

MR Bayle (a) has pretended to prove, that it is better to be an atheist than an idolater; that is, in other words, that it is less dangerous to have no religion at all than a bad one. "I had rather, said he, it should be said of me, that I had no existence, than that I am a villain." This is only a sophism, founded on this, that it is of no importance to the human race to believe that a certain man exists; whereas it is extremely useful for them to believe the existence of a God. From the idea of his non-existence, immediately follows that of our independence; or, if we cannot conceive this idea, that of disobedience. To say that religion is not a restraining motive, because it does not always restrain, is equally absurd as to say that the civil laws are not a restraining motive. It is a false way

(a) Thoughts on the Comet.

way of reasoning against religion, to collect in a large work a long detail of the evils it has produced, if we do not give at the same time an enumeration of the advantages which have flowed from it. Were I to relate all the evils that have arisen in the world from civil laws, from monarchy, and from republican government, I might tell of frightful things. Was it of no advantage for subjects to have religion, it would still be of some if princes had it, and if they whitened with foam the only rein which can restrain those who fear not human laws. A prince who loves and fears religion is a lion, who stoops to the hand that strokes, or to the voice that appeases him. He who fears and hates religion, is like the savage beast that growls and bites the chain which prevents his flying on the passenger. He who has no religion at all, is that terrible animal, who perceives his liberty only when he tears in pieces, and when he devours.

The question is not to know, whether it would be better that a certain man, or a certain people, had no religion, than to abuse what they have; but to know which is the least evil, that religion be sometimes abused, or that there be no such restraint as religion on mankind.

To diminish the horror of atheism, they lay too much to the charge of idolatry. It is far from being true, that when the ancients raised altars to a particular vice, they intended to shew that they loved the vice; this signified, on the contrary, that they hated it. When the Lacedæmonians erected a temple to Fear, it was not to shew that this warlike nation desired that he would in the midst of battle possess the hearts of the Lacedæmonians. They had deities to whom they prayed not to inspire them with guilt; and others, whom they besought to shield them from it.

CHAP. III.

That a Moderate Government is most agreeable to the Christian Religion, and a Despotic Government to the Mahometan.

THE Christian religion is a stranger to mere despotic power. The mildness so frequently recommended in the gospel, is incompatible with the despotic rage with which a prince punishes his subjects, and exercises himself in cruelty.

As this religion forbids the plurality of wives, its princes are less confined, less concealed from their subjects, and consequently have more humanity; they are more disposed to be directed by laws, and more capable of perceiving that they cannot do whatever they please.

While the Mahometan princes incessantly give or receive death, the religion of the Christians renders their princes less timid, and consequently less cruel. The prince confides in his subjects, and the subjects in the prince. How admirable the religion, which while it seems only to have in view the felicity of the other life, constitutes the happiness of this!

It is the Christian religion, that in spite of the extent of the empire, and the influence of the climate, has hindered despotic power from being established in Æthiopia, and has carried into the heart of Africa the manners and laws of Europe.

The heir to the empire of Æthiopia enjoys a principality, and gives to other subjects an example of love and obedience.

Not far from thence may be seen the Mahometan shutting up the children of the King (a) of Sennar; at whose death the council sends to murder them, in favour of the prince who mounts the throne.

Let us set before our eyes on the one hand the continual massacres of the kings and generals of the Greeks and Romans;

VOL. II.

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(a) Description of Æthiopia by M. Ponce, a physician. Collection of Edifying Letters.

and on the other, the destruction of people and cities by those famous conquerors Timur Beg and Jenghiz Khan, who ravaged Asia; and we shall see that we owe to Christianity, in government a certain political law, and in war, a certain law of nations, benefits which human nature can never sufficiently acknowledge.

It is owing to this law of nations, that amongst us victory leaves these great advantages to the conquered, life, liberty, laws, wealth, and always religion, when the conqueror is not blind to his own interest.

We may truly say, that the people of Europe are not at present more disunited than the people and the armies, or even the armies amongst themselves, were under the Roman empire, when it was become a despotic and military government. On the one hand, the armies engaged in a war against each other; and, on the other, they pillaged the cities, and divided or confiscated the lands.

CHAP. IV.

Consequences from the Character of the Christian Religion, and that of the Mahometan.

FROM the Characters of the christian and Mahometan religions, we ought, without any further examination, to embrace the one and reject the other; for it is much easier to prove that religion ought to humanize the manners of men, than that any particular religion is true.

It is a misfortune to human nature, when religion is given by a conqueror. The Mahometan religion, which speaks only by the sword, acts still upon men with that destructive spirit with which it was founded.

The

The history of Sabbaco (a), one of the pastoral kings of Egypt, is very extraordinary. The tutelar god of Thebes appearing to him in a dream, ordered him to put to death all the priests of Egypt. He judged that the Gods were displeased at his being on the throne, since they ordered him to commit an action contrary to their ordinary pleasure; and therefore he retired into Æthiopia.

CHAP. V.

That the Catholic Religion is most agreeable to a Monarchy, and the Protestant to a Republic.

WHEN a religion is introduced and fixed in a state, it is commonly such as is most suitable to the plan of government there established; for those who receive it, and those who are the cause of its being received, have scarcely any other idea of policy than that of the state in which they were born.

When the christian religion, two centuries ago, became unhappily divided into Catholic and Protestant, the people of the north embraced the Protestant, and those of the south adhered still to the Catholic.

The reason is plain: the people of the north have, and will for ever have, a spirit of liberty and independence, which the people of the south have not; and therefore a religion, which has no visible head, is more agreeable to the independency of the climate than that which has one.

In the countries themselves where the Protestant religion became established, the revolutions were made pursuant to the several plans of political government. Luther having great princes on his side, would never have been able to make them relish an ecclesiastic authority that had no exterior pre-eminence;

P 2

while

(a) See Diodorus Lib. 2.

while Calvin, having to do with people who lived under republican governments, or with obscure citizens in monarchies, might very well avoid establishing dignities and pre-eminence.

Each of these two religions was believed to be the most perfect; the Calvinist judging his most conformable to what Christ had said, and the Lutheran to what the Apostles had practised.

CHAP. VI.

Another of Mr Bayle's Paradoxes.

MR Bayle, after having abused all religions, endeavours to fully Christianity: he boldly asserts, that true Christians cannot form a government of any duration. Why not? citizens of this sort being infinitely enlightened with respect to the various duties of life, and having the warmest zeal to fulfill them, must be perfectly sensible of the rights of natural defence. The more they believe themselves indebted to religion, the more they would think due to their country. The principles of Christianity deeply engraved on the heart, would be infinitely more powerful than the false honour of monarchies, than the humane virtues of republics, or the servile fear of despotic states.

It is astonishing, that this great man should not be able to distinguish between the orders for the establishment of Christianity, and Christianity itself; and that he should be liable to be charged with not knowing the spirit of his own religion. When the legislator, instead of laws, has given counsels, this is because he knew that if these counsels were ordained as laws, they would be contrary to the spirit of the laws themselves.

CHAP. VII.

Of the Laws of Perfection in Religion.

HUMAN laws made to direct the will, ought to give precepts, and not counsels; religion made to influence the heart, ought to give many counsels and few precepts.

When, for instance, it gives rules, not for what is good, but for what is better; not to direct to what is right, but what is perfect; it is expedient, that these should be counsels, and not laws: for perfection can have no relation to the universality of men, or things. Besides, if these were laws, there would be a necessity for an infinite number of others to make people observe the first. Celibacy was advised by Christianity: when they made it a law in respect to a certain order of men, it became necessary to make new (a) ones every day, in order to oblige those men to observe it. The legislator wearied himself, and he wearied society, to make men execute by precept, what those who love perfection would have executed as a counsel.

CHAP. VIII.

Of the Connection between the Moral Laws and those of Religion.

IN a country so unfortunate as to have a religion that God has not revealed, it is always necessary for it to be agreeable to morality; because even a false religion is the best security we can have of the probity of men.

The principal points of religion of the inhabitants of Pegu (b) are, not to commit murder, not to steal, to avoid uncleanness,
not

(a) Dupin's Ecclesiastical Library of the 6th century, Vol. 5.

(b) Collection of Voyages that contributed to the establishment of the East India company, Vol. 3. Part 1. p. 63.

not to give the least uneasiness to their neighbour, but to do him, on the contrary, all the good in their power. With these rules they think they should be saved in any religion whatsoever. From hence it proceeds, that these people, though poor and proud, behave with gentleness and compassion to the unhappy.

CHAP. IX.

Of the Essenes.

THE Essenes (c) made a vow to observe justice to mankind, to do no ill to any person, upon whatsoever account; to keep faith with all the world, to hate injustice, to command with modesty, always to side with truth, and to fly from all unlawful gain.

CHAP. X.

Of the Sect of Stoics.

THE several sects of philosophy amongst the ancients, were a species of religion. Never were any principles more worthy of human nature, and more proper to form the good man, than those of the Stoics: and if I could for a moment cease to think that I am a christian, I should not be able to hinder myself from ranking the destruction of the sect of Zeno among the misfortunes that have befallen the human race.

It carried to excess only those things in which there is true greatness, the contempt of pleasure and of pain.

It was this sect alone that made citizens: this alone that made great men; this alone great emperors.

Laying aside for a moment revealed truths, let us search thro' all nature, and we shall not find a nobler object than the Antoninus's:

(c) History of the Jews by Prideaux.

roninus's: even Julian himself, (a commendation thus wrested from me, will not render me an accomplice of his apostacy)—no, there has not been a prince since his reign more worthy to govern mankind.

While the Stoics looked upon riches, human grandeur, grief, inquietudes, and pleasure, as vanity; they were entirely employed in labouring for the happiness of mankind, and in exercising the duties of society. It seems as if they regarded that sacred spirit, which they believed to dwell within them, as a kind of favourable providence watchful over the human race.

Born for society, they all believed that it was their destiny to labour for it; with so much less fatigue, as their rewards were all within themselves. Happy by their philosophy alone, it seemed as if only the happiness of others could increase theirs.

CHAP. XI.

Of Contemplation.

MEN being made to preserve, to nourish, to clothe themselves, and do all the actions of society, religion ought not to give them too contemplative a life (a).

The Mahometans became speculative by habit; they pray five times a-day, and each time they are obliged to cast behind them every thing which has any concern with this world: this forms them for speculation. Add to this that indifference for all things which is inspired by the doctrine of unalterable fate.

If other causes besides these concur to disengage their affections; for instance, if the severity of the government, if the laws concerning the property of land, give them a precarious spirit; all is lost.

The

(a) This is the inconvenience of the doctrine of Foe and Laockium.

The religion of the Gaurs formerly rendered Persia a flourishing kingdom ; it corrected the bad effects of despotic power. The same empire is now destroyed by the Mahometan religion.

CHAP. XII.

Of Penance.

PENANCES ought to be joined with the idea of labour, not with that of idleness ; with the idea of good, not with that of super-eminent ; with the idea of frugality, not with that of avarice.

CHAP. XIII.

Of inexpressible Crimes.

IT appears from a passage of the books of the Pontiffs, quoted by Cicero (a), that they had amongst the * Romans inexpressible crimes ; and it is on this that Zozimus founds the narration so proper to blacken the motives of Constantine's conversion ; and Julian that bitter raillery on this conversion in his *Cæsars*.

The Pagan religion indeed, which prohibited only some of the grosser crimes, and which stopped the hand, but meddled not with the heart, might have crimes that were inexpressible : but a religion which bridles all the passions ; which is not more jealous of actions than of thoughts and desires ; which holds us not by a few chains, but by an infinite number of threads ; which, leaving human justice aside, establishes another kind of justice ; which is so ordered, as to lead us continually from repentance to love, and from love to repentance ; which puts between the judge and the criminal a great mediator, between the just and the mediator a great judge ; a religion like
this

(a) Lib. 2. of Laws.

* Sacrum commissum, quod neque expiari poterit, impie commissum est ; quod expiari poterit publici sacerdotes expiatio.

this ought not to have inexpiable crimes. But, while it gives fear and hope to all, it makes us sufficiently sensible, that though there is no crime in its own nature inexpiable, yet a whole criminal life may be so; that it is extremely dangerous to affront mercy, by new crimes and new expiations; that an uneasiness on account of ancient debts, from which we are never intirely free, ought to make us afraid of contracting new ones, of filling up the measure, and going even to that point where paternal goodness ends.

CHAP. XIV.

In what manner Religion has an Influence on Civil Laws.

AS both religion and the civil laws ought to have a peculiar tendency to render men good citizens, it is evident that when one of these deviates from this end, the tendency of the other ought to be strengthened. The less severity there is in religion, the more there ought to be in the civil laws.

Thus the reigning religion of Japan having few doctrines, and proposing neither future rewards nor punishments, the laws to supply these defects have been made with the spirit of severity, and are executed with an extraordinary punctuality.

When the doctrine of necessity is established by religion, the penalties of the laws ought to be more severe, and the magistrates more vigilant; to the end that men, who would otherwise become abandoned, might be determined by these motives: but it is quite otherwise where religion has established the doctrine of liberty.

From the inactivity of soul springs the Mahometan doctrine of predestination, and from this doctrine of predestination springs the inactivity of soul. This, they say, is in the decrees of God; they must therefore indulge their repose. In a case like this, the magistrate ought to awaken by the laws those who are lulled asleep by religion.

When religion condemns things which the civil laws ought to permit, there is danger lest the civil laws, on the other hand, should permit what religion ought to condemn. Either of these is a constant proof of a want of true ideas, of that harmony and proportion which ought to subsist between both.

Thus the Tartars (a) under Jenghiz-Khan, amongst whom it was a sin and even a capital crime to put a knife in the fire, to lean against a whip, to strike a horse with his bridle, to break one bone with another, did not believe it to be any sin to break their word, to seize upon another man's goods, to do an injury to a person, or to commit murder. In a word, laws which render that necessary which is only indifferent, have this inconvenience, that they make those things indifferent which are absolutely necessary.

The people of Formosa (b) believe, that there is a kind of hell; but it is to punish those who at certain seasons have not gone naked; who have dressed in calicoe, and not in silk; who have presumed to look for oysters; or who have undertaken any business without consulting the song of birds; while drunkenness and debauchery are not regarded as crimes. They believe even that the debauches of their children are agreeable to their gods.

When religion absolves the mind by a thing merely accidental, it loses its greatest influence on mankind. The people of India believe, that the waters of the Ganges have a sanctifying virtue (c). Those who die on its banks are imagined to be exempted from the torments of the other life, and to be entitled to dwell in a region full of delights; and for this reason the ashes of the dead are sent from the most distant places to be thrown

(a) See the relation written by John Duplan Carpin, sent to Tartary, by Pope Innocent IV. in the year 1246.

(b) Collection of Voyages that contributed to the establishment of the East India company, vol. v. page 192.

(c) Edifying Letters, Collect, 15.

thrown into this river. Little then does it signify, whether they have lived virtuously or not, so they be but thrown into the Ganges.

The idea of a place of rewards has a necessary connection with the idea of the abodes of misery ; and when they hope for the first without fearing the latter, the civil laws have no longer any influence. Men who believe that they are sure of the rewards of the other life, are above the power of the legislator ; they look upon death with too much contempt ; how shall the man be restrained by laws, who believes that the greatest pain the magistrate can inflict will end in a moment to begin his happiness ?

CHAP. XV.

How false Religions are sometimes corrected by the Civil Laws.

SIMPLICITY, superstition, or a respect for antiquity, have sometimes established mysteries or ceremonies shocking to modesty : of this the world has furnished numerous examples. Aristotle (a) says, that in this case the law permits the fathers of families to repair to the temple to celebrate these mysteries for their wives and children. How admirable the civil law, which in spite of religion preserves the manners untainted !

Augustus (b) excluded the youth of either sex from assisting at any nocturnal ceremony, unless accompanied by a more aged relation ; and when he revived the Lupercalia, he would not allow the young men to run naked.

Q. 2.

CHAP.

(a) Polit. Lib. 7. chap. 17.

(b) Suetonius in Augusto, cap. 31.

CHAP. XVI.

How the Laws of Religion correct the Inconveniencies of a Political Constitution.

ON the other hand, religion may support a state, when the laws themselves are incapable of doing it.

Thus when a kingdom is frequently agitated by civil wars, religion may do much by obliging one part of the state to remain always quiet. Among the Greeks, the Eleans, as priests of Apollo, enjoyed a perpetual peace. In Japan, (c) the city of Meaco enjoys a constant peace, as being a holy city : religion supports this regulation, and that empire which seems to be alone upon earth, and which neither has nor will have any dependence on foreigners, has always in its own bosom a trade which war cannot ruin.

In kingdoms where wars are not entered upon by a general consent, and where the laws have not pointed out any means either of terminating or preventing them, religion establishes times of peace, or cessation of hostilities, that the people may be able to sow their corn, and perform those other labours which are absolutely necessary for the subsistence of the state.

Every year all hostility ceases between the (a) Arabian tribes for four months ; the least disturbance would then be an impiety. In former times, when every lord in France declared war or peace, religion granted a truce, which was to take place at certain seasons.

When a state has many causes for hatred, religion ought to produce many ways of reconciliation. The Arabs, a people addicted to robbery, are frequently guilty of doing injury and injustice.

(c) Collection of Voyages made to establish an India Company, vol. 4. p. 127.

(a) See Prideaux's Life of Mahomet, p. 64.

injustice. Mahomet (a) enacted this law; "If any one for-
 " gives * the blood of his brother, he may pursue the male-
 " factor for damages and interest: but he who shall injure the
 " wicked, after having received satisfaction, shall in the day
 " of judgment suffer the most grievous torments."

The Germans inherited the hatred and enmity of their near relations: but these were not eternal. Homicide was expiated by giving a certain number of cattle, and all the family received satisfaction: A thing extremely useful, says Tacitus (b), because enmities are most dangerous amongst a free people. I believe, indeed, that their ministers of religion, who were held by them in so much credit, were concerned in these reconciliations.

Amongst the inhabitants of Malacca (c), where no form of reconciliation is established, he who has committed murder is certain of being assassinated by the relations or friends of the deceased, abandons himself to fury, and wounds or kills all he meets.

CHAP. XVII.

How the Laws of Religion have the effect of Civil Laws.

THE first Greeks were small nations, frequently dispersed, pirates at sea, unjust at land, without government and without laws. The mighty actions of Hercules and Theseus let us see the state of that rising people. What could religion do more than it did to inspire them with horror against murder? It

(a) Koran, book I. chap. of the cow.

* On renouncing the law of retaliation.

(b) De morib. Germanorum.

(c) Collection of Voyages that contributed to the establishment of the East India Company, Vol. vii. Page 303. See also Memoirs of the C. de Forbin, and what he says of the people of Macassar.

It declared that the man who had been (b) murdered was enraged against the assassin, that he would possess his mind with terror and trouble, and oblige him to yield to him the places he had frequented when alive. They could not touch the criminal nor converse with him (c), without being defiled: the murderer was to be expelled the city, and an expiation made for the crime (d).

CHAP. XVIII.

That it is not so much the truth or falsity of a Doctrine which renders it useful or pernicious to men in civil government, as the use or abuse which is made of it.

THE most true and holy doctrines may be attended with the very worst consequences, when they are not connected with the principles of society; and, on the contrary, doctrines the most false may be attended with excellent consequences, when contrived so as to be connected with these principles.

The religion of Confucius * disowns the immortality of the soul; and the sect of Zeno did not believe it. These two sects have drawn from their bad principles, consequences, not just indeed, but most admirable as to their influence on society. Those of the religion of Tao, and of Foe, believe the immortality of the soul; but from this sacred doctrine they draw the most frightful consequences.

The

(b) Plato of Laws, lib. ix.

(c) Tragedy of Oedipus Coloneus.

(d) Plato of Laws lib. ix.

* A Chinese philosopher reasons thus against the doctrine of Foe: "It is said in a book of that sect, that the body is our dwelling place, and the soul the immortal guest which lodges there: but if the bodies of our relations are only a lodging, it is natural to regard them with the same contempt we should feel for a structure of earth and dirt. Is not this endeavouring to tear from the heart the virtue of love to one's own parents? This leads us even to neglect the care of the body, and to refuse it the compassion and affection so necessary for its preservation: hence the disciples of Foe kill themselves by thousands." Work of an ancient Chinese philosopher, in the Collection of Du Halde, vol. iii. page 52.

The doctrine of the immortality of the soul falsely understood, has, almost throughout the whole world, and in every age, engaged women, slaves, subjects, friends, to murder themselves, that they might go and serve in the other world the object of their respect or love in this. Thus it was in the West-Indies; thus it was amongst the Danes (a): thus it is at present in Japan (b), in Macassar (c), and in many other places.

These customs do not so directly proceed from the doctrine of the immortality of the soul, as from that of the resurrection of the body, from whence they have drawn this consequence, that after death the same individual will have the same wants, the same sentiments, the same passions. In this point of view, the doctrine of the immortality of the soul has a prodigious effect on mankind; because the idea of only a simple change of habitation is more within the reach of the human understanding, and more adapted to flatter the heart, than the idea of a new modification.

It is not enough for religion to establish a doctrine, it must also direct its influence. This the Christian religion performs in the most admirable manner, particularly with regard to the doctrines of which we have been speaking. It makes us hope for a state which is the object of our belief; not for a state which we have already experienced, or known: thus every article, even the resurrection of the body, leads us to spiritual ideas.

The sacred books (d) of the ancient Persians say, "If you would be holy, instruct your children, because all the good actions which they perform will be imputed to you." They advise them to marry betimes, because children at the day of judgment

(a) See Tho. Bortholin's Ant. of the Danes.

(b) An account of Japan, in the Collection of Voyages that contributed to establish an East India Company.

(c) Forbin's Memoirs.

(d) Mr Hyde.

judgment will be as a bridge, over which those who have none cannot pass. These doctrines were false, but extremely useful.

CHAP. XIX.

Of the Metempsychosis.

THE doctrine of the immortality of the soul is divided into three branches, that of pure immortality, that of a simple change of habitation, and that of a metempsychosis: that is the system of the Christians, that of the Scythians, and that of the Indians. We have just been speaking of the two first, and I shall say of the last, that as it has been well or ill explained, it has good or bad effects. As it inspires men with a certain horror against bloodshed, very few murders are committed in the Indies; and though they seldom punish with death, yet they enjoy a perfect tranquillity.

On the other hand, women burn themselves at the death of their husbands; it is only the innocent who suffer a violent death.

CHAP. XX.

That it is dangerous for Religion to inspire an aversion for things in themselves indifferent.

A KIND of honour established in the Indies by the prejudices of religion, has made the several tribes conceive an aversion against each other. This honour is founded entirely on religion; these family distinctions form no civil distinctions; there are Indians who would think themselves dishonoured by eating with their king.

These sorts of distinctions are connected with a certain aversion for other men, very different from those sentiments which ought to proceed from difference of rank; which, amongst us, comprehend a love for inferiors.

The

The laws of religion should never inspire an aversion to any thing but vice, and above all, they should never estrange man from a love and tenderness for his own species.

The Mahometan and Indian religions have in their bosom an infinite number of people: the Indians hate the Mahometans, because they eat cows: the Mahometans detest the Indians, because they eat hogs.

CHAP. XXI.

Of Festivals.

WHEN religion appoints a cessation from labour, it ought to have a greater regard to the necessities of mankind, than to the grandeur of the being it designs to honour.

Athens (a) was subject to great inconveniencies from the excessive number of its festivals. These powerful people, to whose decision all the cities of Greece came to submit their quarrels, could not have time to dispatch such a multiplicity of affairs.

When Constantine ordained that the people should rest on the sabbath, he made this decree for the cities *, and not for the inhabitants of the open country; he was sensible that labour in the cities was useful, but in the fields necessary.

For the same reason, in a country supported by commerce, the number of festivals ought to be relative to this very commerce. Protestant and Catholic countries are situated † in such a manner, that there is more need of labour in the former than in the latter; the suppression of festivals is therefore more suitable to Protestant than to Catholic countries.

Dampierre (b) observes, that the diversions of different nations vary greatly according to the climate. As hot climates
Vol. II. R produce

(a) Xenophon on the republic of Athens.

* Leg. 3. Cod. de Feriis. This law was doubtless made only for the Pagans.

† The Catholics lie more towards the south, and the Protestants towards the north.

(b) Dampierre's Voyages, vol. ii.

produce a quantity of delicate fruits, the barbarians easily find necessaries, and therefore spend much time in diversions. The Indians of colder countries have not so much leisure, being obliged to fish and hunt continually; hence they have less music, dancing, and festivals. If a new religion should be established amongst these people, it ought to have regard to this in the institution of festivals.

CHAP. XXII.

Of the Local Laws of Religion.

THERE are many local laws in various religions; and when Montezuma with so much obstinacy insisted, that the religion of the Spaniards was good for their country, and his for Mexico, he did not assert an absurdity; because, in fact, legislators could never help having a regard to what nature had established before them.

The opinion of the metempsychosis is adapted to the climate of the Indies. An excessive heat burns (b) up all the country; they can breed but very few cattle; they are always in danger of wanting them for tillage; their black cattle multiply but indifferently (c); and they are subject to many distempers: a law of religion which preserves them, is therefore most suitable to the policy of the country.

While the meadows are scorched up, rice and pulse, by the assistance of water, are brought to perfection: a law of religion which permits only this kind of nourishment, must therefore be extremely useful to men in these climates.

The flesh (a) of cattle in that country is insipid, but the milk and butter which they receive from them serves for a part of their subsistence: therefore the law which prohibits the eating and killing of cows, is in the Indies not unreasonable.

Athens

(b) See Bernier's Travels, vol. ii. p. 137.

(c) Edifying Letters, Collect. xii. page 95.

(a) Bernier's Travels, vol. ii. p. 187.

Athens contained a prodigious multitude of people, but its territory was barren. It was therefore a religious maxim with this people, that those who offered some small presents to the gods (b), honoured them more than those who sacrificed an ox.

CHAP. XXIII.

The inconveniency of transplanting a Religion from one Country to another.

IT follows from hence, that there are frequently many inconveniencies attending the transplanting a religion from one country to another.

"The hog, says Mr de Boulainvilliers (c), must be very scarce in Arabia, where there are almost no woods, and hardly any thing fit for the nourishment of these animals: besides, the saltness of the water and food renders the people most susceptible of cutaneous disorders." This local law could not be good in other * countries, where the hog is almost an universal, and in some sort a necessary nourishment.

I shall here make a reflection. Sanctorius has observed that pork transpires but little (d), and that this kind of meat greatly hinders the transpiration of other food; he has found that this diminution amounts to a third (e). Besides it is known, that the want of transpiration forms or increases the disorders of the skin. The feeding on pork ought therefore to be prohibited, in climates where the people are subject to these disorders, as in Palestine, Arabia, Ægypt, and Lybia.

Sir John Chardin (g) says, that there is not a navigable river in Persia, except the Kur, which is at the extremity of the empire. The ancient law of the Gaurs, which prohibited fail-

R 2

ing

(b) Euripides in Athenæo, lib. ii.

(c) Life of Mahomet.

* As in China.

(d) Medicina Statica, Sect. 3. Aphor. 23.

(e) Ibid.

(g) Travels through Persia, Vol. ii.

ing on rivers, was not therefore attended with any inconvenience in this country, though it would have ruined the trade of another.

Frequent bathings are extremely useful in hot climates. On this account they are ordained in the Mahometan law, and in the Indian religion. In the Indies it is a most meritorious act to pray to God (c) in the running stream: but how could these things be performed in other climates?

When a religion adapted to the climate of one country clashes too much with the climate of another, it cannot be there established; and whenever it has been introduced, it has been afterwards discarded. It seems to all human appearance, as if the climate had prescribed the bounds of the Christian and Mahometan religions.

It follows from hence, that it is almost always proper for a religion to have particular doctrines, and a general worship. In laws concerning the practice of religious worship, there ought to be but few particulars: for instance, they should command mortification in general, and not a certain kind of mortification. Christianity is full of good sense: abstinence is of divine institution; but a particular kind of abstinence is ordained by human authority, and therefore may be changed.

BOOK

(c) Bernier's Travels, Vol. ii.

BOOK XXV.

Of Laws as relative to the Establishment of Religion and its external Polity.

CHAP. I.

Of Religious Sentiments.

THE pious man and the atheist always talk of religion; the one speaks of what he loves, and the other of what he fears.

CHAP. II.

Of the motives of attachment to different Religions.

THE different religions of the world do not give to those who profess them equal motives of attachment; this depends greatly on the manner in which they agree with the turn of thought and perceptions of mankind.

We are extremely addicted to idolatry, and yet have no great inclination for the religion of idolaters: we are not very fond of spiritual ideas, and yet are most attached to those religions which teach us to adore a spiritual being. This proceeds from the satisfaction we find in ourselves at having been so intelligent as to chuse a religion, which raises the deity from that baseness in which he had been placed by others. We look upon idolatry as the religion of an ignorant people; and the religion

religion which has a spiritual being for its object, as that of the most enlightened nations.

When with a doctrine that gives us the idea of a spiritual supreme being, we can still join those of a sensible nature, and admit them into our worship, we contract a greater attachment to religion; because those motives which we have just mentioned, are added to our natural inclination for the objects of sense. Thus the Catholics, who have more of this kind of worship than the Protestants, are more attached to their * religion, than the Protestants to theirs.

When the (a) people of Ephesus were informed that the fathers of the council had declared they might call the Virgin Mary the *Mother of God*, they were transported with joy, they kissed the hands of the bishops, they embraced their knees, and the whole city resounded with acclamations.

When an intellectual religion superadds the idea of a choice made by the deity, and a preference of those who profess it to those who do not, this greatly attaches us to religion. The Mahometans would not be such good Mussulmans, if on the one hand there were not idolatrous nations who make them imagine themselves the champions of the unity of God; and on the other, Christians, to make them believe that they are the objects of his presence.

A religion burdened with many † ceremonies, attaches us to it more strongly than that which has a fewer number.

We have an extreme propensity to things in which we are continually employed: witness the obstinate prejudices of the ‡ Mahometans

* They are more zealous for its propagation.

(a) St. Cyril's Letter.

† This does not contradict what I have said in the last chapter of the preceding book: I here speak of the motives of attachment to religion, and there of the means of rendering it more general.

‡ This has been remarked over all the world. See, as to the Turks, the missions of the Levant; the Collection of Voyages that contributed to the establishment of an East India company, Vol. iii, p. 201. on the Moors of Batavia; and Father Labat on the Mahometan Negroes, &c.

Mahometans and the Jews; and the readiness with which barbarous and savage nations change their religion, who, as they are employed entirely in hunting or war, have but few religious ceremonies.

Men are extremely inclined to the passions of hope and fear; a religion, therefore, that had neither a heaven nor a hell, could hardly please them. This is proved by the ease with which foreign religions have been established in Japan, and the zeal and fondness with which they were received †.

In order to raise an attachment to religion, it is necessary that it should inculcate pure morals. Men who are knaves by retail are extremely honest in the gross; they love morality. And were I not treating of so grave a subject, I should say that this appears remarkably evident in our theatres: we are sure of pleasing the people by sentiments avowed by morality; we are sure of shocking them by those it disapproves.

When external worship is attended with great magnificence, it flatters our minds, and strongly attaches us to religion. The riches of temples, and those of the clergy, greatly affect us. Thus even the misery of the people is a motive that renders them fond of a religion, which has served as a pretext to those who were the cause of their misery.

CHAP. III.

Of Temples.

ALMOST all civilized nations dwell in houses; from hence naturally arose the idea of building a house for God, in which they might adore and seek him amidst all their hopes and fears.

In

† The Christian and Indian religions; these have a hell and a paradise, which the religion of Sintos has not.

In fact, nothing is more comfortable to mankind, than a place in which they may find the deity peculiarly present, and where they may assemble together to confess their weakness and tell their griefs.

But this natural idea never occurred to any but such as cultivated the land; those who had no houses for themselves were never known to build temples.

This was the cause that made Jenghiz-Khan discover such a prodigious contempt for mosques *. This prince † examined the Mahometans; he approved of all their doctrines, except that of the necessity of going to Mecca: he could not comprehend why God might not every where be adored. As the Tartars did not dwell in houses, they could have no idea of temples.

Those people who have no temples, have but a small attachment to their own religion. This is the reason why the Tartars have in all times given so great a toleration ‡; why the barbarous nations who conquered the Roman empire, did not hesitate a moment to embrace Christianity; why the savages of America have so little fondness for their own religion; why, since our missionaries have built churches in Paraguay, the natives of that country are become so zealous for ours.

As the deity is the refuge of the unhappy, and none are more unhappy than criminals, men have been naturally led to think temples an asylum for those wretches. This idea appeared still more natural to the Greeks, where murderers chased from their city and the presence of men, seemed to have no houses but the temples, nor other protectors but the gods.

At first these were only designed for involuntary homicides; but when the people made them a sanctuary for great criminals,

* Entering the Mosque of Bochra, he took the Koran, and threw it under his horse's feet. *Hist. of the Tartars*, p. 173.

+ *Ibid.* p. 342.

‡ This disposition of mind has been communicated to the Japanese, who, as is easily proved, derive their original from the Tartars.

nals, they fell into a gross contradiction. If they had offended men, they had much greater reason to believe they had offended the gods.

These asylums multiplied in Greece. The temples, says Tacitus (a), were filled with insolvent debtors, and wicked slaves; the magistrate found it difficult to exercise his office; the people protected the crimes of men as the ceremonies of the gods; at length the senate was obliged to retrench a great number of them.

The laws of Moses were perfectly wise. The man who involuntarily killed another was innocent; but he was obliged to be taken away from before the eyes of the relations of the deceased: Moses therefore appointed an asylum (b) for such unfortunate people. Great criminals deserved not a place of safety, and they had none (c); the Jews had only a portable tabernacle, which continually changed its place: this excluded the idea of a sanctuary. It is true that they had afterwards a temple; but the criminals who would resort thither from all parts might disturb the divine service. If persons who had committed manslaughter had been driven out of the country, as was customary amongst the Greeks, they had reason to fear that they would worship strange gods. All these considerations made them establish cities of refuge, where they might stay till the death of the high priest.

CHAP. IV.

Of the Ministers of Religion.

THE first men, says Porphyry, sacrificed only vegetables. In a worship so simple, every one might be priest in his own family.

VOL. II.

S

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(a) Annal. Lib. 2.

(b) Numbers 35.

(c) Ibid.

The natural desire of pleasing the deity multiplied ceremonies. From hence it followed, that men employed in agriculture became incapable of observing them all, and of filling up the number.

Particular places were consecrated to the gods; it then became necessary that they should have ministers to take care of them; in the same manner as every citizen took care of his house and domestic affairs. Hence the people who have no priests are commonly barbarians: such were formerly the Pedalians (d), and such are still the Wolgusky *.

Men consecrated to the deity ought to be honoured, especially amongst people who have formed an idea of a personal purity necessary to approach the places most agreeable to the gods, and for the performance of particular ceremonies.

The worship of the gods requiring a continual application, most nations were led to consider the clergy as a separate body. Thus, amongst the Egyptians, the Jews, and the Persians (e), they consecrated to the deity certain families who performed and perpetuated the service. There have been even religions, which have not only estranged ecclesiastics from business, but have also taken away the embarrassments of a family; and this is the practice of the principal branch of Christianity.

I shall not here treat of the consequences of the law of celibacy: it is evident, that it may become hurtful, in proportion as the body of the clergy may be too numerous; and, in consequence of this, that of the laity too small.

By the nature of the human understanding, we love in religion every thing which carries the idea of difficulty; as in point of morality we have a speculative fondness for every thing which bears the character of severity. Celibacy has been most agreeable

(d) Lillus Giraldus, page 726.

* A people of Siberia. See the account given by Mr Everard Ysbrant-Ides, in the collection of travels to the north. Vol. 8.

(e) See Mr Hyde,

agreeable to those nations to whom it seemed least adapted, and with whom it might be attended with the most fatal consequences. In the southern countries of Europe, where, by the nature of the climate, the law of celibacy is more difficult to observe, it has been retained; in those of the north, where the passions are less lively, it has been banished. Further, in countries where there are few inhabitants, it has been admitted; in those that are vastly populous, it has been rejected. It is obvious that these reflections relate only to the too great extension of celibacy, and not to celibacy itself.

CHAP. V.

Of the bounds which the Laws ought to prescribe to the Riches of the Clergy.

AS particular families may be extinct, their wealth cannot be a perpetual inheritance. The clergy is a family which cannot be extinct; wealth is therefore fixed to it for ever, and cannot go out of it.

Particular families may increase; it is necessary then that their wealth should also increase. The clergy is a family which ought not to increase; their wealth ought then to be limited.

We have retained the regulations of the Levitical laws as to the possessions of the clergy, except those relating to the bounds of these possessions: indeed, amongst us, we must ever be ignorant of the bounds, beyond which any religious community can no longer be permitted to acquire.

These endless acquisitions appear to the people so unreasonable, that he who should speak in their defence would be regarded as an idiot.

The civil laws find sometimes many difficulties in altering established abuses: because they are connected with things worthy of respect: in this case an indirect proceeding would be a greater proof of the wisdom of the legislator, than another which struck directly at the thing itself. Instead of prohibiting the

acquisition of the clergy, we should seek to give them a distaste for them ; to leave them the right, and to take away the fact.

In some countries of Europe, a respect for the privileges of the nobility has established in their favour a right of indemnity over immoveable goods acquired in mortmain. The interest of the prince has in the same case made him exact a right of amortization. In Castile, where there is no such right, the clergy have seized upon every thing. In Arragon, where there is some right of amortization, they have obtained less : in France, where this right and that of indemnity are established, they have acquired less still ; and it may be said, that the prosperity of this kingdom is in a great measure owing to the exercise of these two rights. If possible, then, increase these rights, and put a stop to the mortmain.

Render the ancient and necessary patrimony of the clergy sacred and inviolable ; let it be fixt and eternal, like that body itself : but let new inheritances be out of their power.

Permit them to break the rule, when the rule is become an abuse ; suffer the abuse, when it enters into the rule.

They still remember at Rome a certain memorial sent thither on some disputes with the clergy, in which was this maxim : " The clergy ought to contribute to the expences of the state, " let the Old Testament say what it will." They concluded from this passage, that the author of this memorial was better versed in the language of the tax-gatherers than in that of religion.

CHAP. VI.

Of Monasteries.

THE least degree of common sense will let us see that bodies designed for a perpetual continuance should not be allowed to sell their funds for life, nor to borrow for life ; unless we want them to be heirs to all those who have no relations, and to those who do not chuse to have any. These men play against the people, but they hold the bank themselves.

CHAP.

CHAP. VII.

Of the luxury of Superstition.

“THOSE are guilty of impiety towards the gods, says Plato,
 “ (a) who deny their existence; or who, while they believe
 “ it, maintain that they do not interfere with what is done here
 “ below; or, in fine, who think that they can easily appease
 “ them by sacrifices: three opinions equally pernicious.” Plato
 has here said all that the clearest light of nature has ever been
 able to say, in point of religion.

The magnificence of external worship has a principal connection with the constitution of the state. In good republics, they have curbed not only the luxury of vanity, but even that of superstition. They have introduced frugal laws into religion. Of this number are many of the laws of Solon, many of those of Plato on funerals adopted by Cicero; and, in fine, some of the laws of Numa * on sacrifices.

Birds, says Cicero, and paintings begun and finished in a day, are gifts the most divine. We offer common things, says a Spartan, that we may always have it in our power to honour the gods.

The desire of man to pay his worship to the deity, is very different from the magnificence of this worship. Let us not offer our treasures to him, if we are not proud of shewing that we esteem what he would have us despise.

“ What must the gods think of the gifts of the impious, said
 “ the admirable Plato, when a good man would blush to receive presents from a villain.”

Religion

* Rogum vino ne respergito. Law of the twelve tables.

(a) On Laws, Book X.

Religion ought not, under the pretence of gifts, to draw from the people, what the necessities of the state have left them ; but, as Plato (b) says, " The chaste and the pious ought to offer gifts which resemble themselves."

Nor is it proper for religion to encourage expensive funerals. What is there more natural, than to take away the difference of fortune in a circumstance, and in the very moment, which equals all fortunes ?

CHAP. VIII.

Of the Pontificate.

WHEN religion has many ministers, it is natural for them to have a chief, and for a sovereign pontiff to be established. In monarchies, where the several orders of the state cannot be kept too distinct, and where all powers ought not to be lodged in the same person ; it is proper that the pontificate be distinct from the empire. The same necessity is not to be met with in despotic governments, the nature of which is to unite all the different powers in the same person. But in this case it may happen, that the prince may regard religion as he does the laws themselves, as dependent on his own will. To prevent this inconveniency, there ought to be monuments of religion, for instance sacred books, which fix and establish it. The king of Persia is the chief of the religion ; but this religion is regulated by the Koran. The emperor of China is the sovereign pontiff : but there are books in the hands of every body, to which he himself must conform. In vain a certain emperor attempted to abolish them, they triumphed over tyranny.

CHAP.

(b) On Laws, lib. ii.

CHAP. IX.

Of Toleration in point of Religion.

WE are here politicians, and not divines: but the divines themselves must allow that there is a great difference between tolerating and approving a religion.

When the legislator has believed it a duty to permit the exercise of many religions, it is necessary that he should enforce also a toleration amongst these religions themselves. It is a principle that every religion which is persecuted becomes itself persecuting: for as soon as by some accidental turn it arises from persecution, it attacks the religion which persecuted it, not as a religion, but as a tyranny.

It is necessary then that the laws require from the several religions, not only that they shall not embroil the state, but that they shall not raise disturbances amongst themselves. A citizen does not fulfil the laws, by not disturbing the government; it is requisite that he should not trouble any citizen whomsoever.

As there are scarce any but persecuting religions that have an extraordinary zeal for being established in other places (because a religion that can tolerate others seldom thinks of its own propagation); it must therefore be a very good civil law, when the state is already satisfied with the established religion, not to suffer the establishment of another.

This is then a fundamental principle of the political law in regard to religion, that when the state is at liberty to receive or to reject a new religion, it ought to be rejected; when it is received, it ought to be tolerated.

CHAP.

CHAP. X.

Of changing a Religion.

A PRINCE who undertakes to destroy or to change the established religion of his kingdom, must greatly expose himself. If his government is despotic, he runs a much greater risk of seeing a revolution arise from such a proceeding, than from any tyranny whatsoever, and a revolution is not an uncommon thing in such states. The reason of this is, because a state cannot change its religion, manners, and customs in an instant, and with the same rapidity as the prince publishes the ordinance which establishes a new religion.

Besides, the ancient religion is connected with the constitution of the kingdom, and the new one is not; the former agrees with the climate, and very often the new one is opposite to it. Moreover, the citizens, disgusted with their laws, look upon the government already established with contempt; they conceive a jealousy against the two religions, instead of a firm belief in one; and in a word, these innovations give the state, at least for some time, both bad citizens and bad believers.

CHAP. XI.

Of Penal Laws.

PENAL laws ought to be avoided, in respect to religion: they imprint fear, it is true; but as religion has also penal laws which inspire fear, the one is effaced by the other; and between these two different kinds of fear, the mind becomes hardened.

The threatnings of religion are so terrible, and its promises so great, that when they actuate the mind, whatever efforts the magistrate may use to oblige us to renounce it, he seems to leave us nothing when he deprives us of the exercise of our religion, and to bereave us of nothing when we are freely allowed to profess it.

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It is not therefore by filling the soul with the idea of this great object, by hastening her approach to that critical moment in which it ought to be of the highest importance, that she can be most effectually detached from any particular religion: A more certain way is to tempt her by favours, by the conveniences of life, by the hopes of fortune; not by that which warns her of danger, but by that which makes her forget it; not by that which shocks her, but by that which throws her into indifference, at the time when other passions actuate the mind, and those which the religion inspires are hushed into silence. A general rule in changing a religion; the invitations should be much stronger than the penalties.

The temper of the human mind has appeared even in the nature of the punishments they have employed. If we take a survey of the persecutions in Japan (a), we shall find that they were more shocked at cruel torments than at long sufferings, which rather weary than affright, which are the more difficult to surmount from their appearing less difficult.

In a word, history sufficiently informs us, that penal laws have never had any other effect but to destroy.

CHAP. XII.

A most humble Remonstrance to the Inquisitors of Spain and Portugal.

A JEWESS of eighteen years of age, who was burnt at Lisbon at the last *Auto-de-fé*, gave occasion to the following little piece; the most idle, I believe, that ever was wrote. When we attempt to prove things so evident, we are sure never to convince.

The author declares, that though a Jew, he has a respect for the Christian religion: and that he should be glad to take away

VOL. II.

T

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(a) In the Collection of Voyages that contributed to the establishment of an East-India company, vol. 5.

from the princes who are not Christians, a plausible pretence for persecuting this religion.

" You complain, says he to the inquisitors, that the Emperor of Japan caused all the Christians in his dominions to be burnt by a slow fire. But he will answer, we treat you, who do not believe like us, as you yourselves treat those who do not believe like you; you can only complain of your weakness, which has hindered you from exterminating us, and which has enabled us to exterminate you.

" But it must be confessed, that you are much more cruel than this Emperor. You put us to death, who believe only what you believe, because we do not believe all that you believe. We follow a religion, which you yourselves know to have been formerly dear to God. We think that God loves it still, and you think that he loves it no more: and because you judge thus, you make those suffer by sword and fire, who hold an error so pardonable as to believe that God * still loves what he once loved.

" If you are cruel to us, you are much more so to our children; you cause them to be burnt, because they follow the inspirations given them by those whom the law of nature, and the laws of all nations, teach them to regard as Gods.

" You deprive yourselves of the advantage you have over the Mahometans, with respect to the manner in which their religion was established. When they boast of the number of their believers, you tell them that they have obtained them by violence, and that they have extended their religion by the sword; why then do you establish yours by fire?

" When you would bring us over to you, we object a source from which you glory to descend. You reply to us, that though your religion is new, it is divine; and you prove it from its growing amidst the persecution of Pagans, and when watered

* The source of the blindness of the Jews is, their not perceiving that the œconomy of the gospel is in the order of the designs of God; and that it is in this light a consequence of his immutability itself.

“ watered by the blood of your martyrs : but at present you
“ play the part of the Dioclesians, and make us take yours.

“ We conjure you, not by the Mighty God whom both you
“ and we serve, but by that Christ who, you tell us, took upon
“ him a human form, to propose himself for an example for
“ you to follow ; we conjure you to behave to us as he himself
“ would behave was he upon earth. You would have us be
“ Christians, and you will not be so yourselves.

“ But if you will not be Christians, be at least men : treat
“ us as you would, if having only the weak light of justice
“ which nature bestows, you had not a religion to conduct, and
“ a revelation to enlighten you.

“ If heaven has had so great a love for you, as to make you
“ see the truth, you have received a great favour : but is it for
“ children who have received the inheritance of their father, to
“ hate those who have not ?

“ If you have this truth, hide it not from us by the manner
“ in which you propose it. The characteristic of truth is its
“ triumph over hearts and minds, and not that impotency
“ which you confess, when you would force us to receive it by
“ tortures.

“ If you were wise, you would not put us to death for no
“ other reason, but because we are unwilling to deceive you.
“ If your Christ is the son of God, we hope he will reward us
“ for being so unwilling to profane his mysteries ; and we be-
“ lieve, that the God whom both you and we serve, will not
“ punish us for having suffered death for a religion which he
“ formerly gave us, only because we believe that he still conti-
“ nues to give it.

“ You live in an age in which the light of nature shines more
“ bright than it has ever done ; in which philosophy has en-
“ lightened human understandings ; in which the morality of
“ your gospel has been more known ; in which the respective
“ rights of mankind, with regard to each other, and the em-
“ pire which one conscience has over another, are best under-
“ stood. If you do not therefore shake off your ancient pre-

“judices, which, whilst unregarded, mingle with your passions, it must be confessed, that you are incorrigible, incapable of any degree of light or instruction; and a nation must be very unhappy that gives authority to such men.

“Would you have us frankly tell you our thoughts? You consider us rather as your enemies, than as the enemies of your religion: for if you loved your religion, you would not suffer it to be corrupted by such gross ignorance.

“It is necessary that we should advertise you of one thing, that is, if any one in times to come shall dare to assert, that in the age in which we live the people of Europe were civilized, you will be cited to prove that they were barbarians; and the idea they will have of you, will be such as will dishonour your age, and spread hatred over all your contemporaries.”

CHAP. XIII.

Why the Christian Religion is so odious in Japan.

WE have already mentioned (a) the perverse temper of the people of Japan. The magistrates considered the firmness which Christianity inspires, when they attempted to make the people renounce their faith, as in itself most dangerous: they fancied that it increased their obstinacy. The law of Japan punishes severely the least disobedience. They ordered them to renounce the Christian religion: they did not renounce it, this was disobedience; they punished this crime; and the continuance in disobedience seemed to deserve another punishment.

Punishments among the Japanese are considered as the revenge of an insult done to the prince. The songs of triumph sung by our martyrs appeared as an outrage against him; the title of martyr provoked the magistrates; in their opinion it signified rebel: they did all in their power to prevent their obtaining it.

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(a) Book vi. Chap. 24.

It was then that their minds were exasperated, and a horrid struggle was seen between the tribunals that condemned, and the accused who suffered ; between the civil laws, and those of religion.

CHAP. XIV.

Of the Propagation of Religion.

ALL the people of the east, except the Mahometans, believe all religions in themselves indifferent. They fear the establishment of another religion, no otherwise than as a change in government. Amongst the Japanese, where there are many sects, and where the state has had for so long a time an ecclesiastical superior, they (a) never dispute on religion. It is the same with the people of Siam (b). The Calmucks (c) do more, they make it a point of conscience to tolerate every species of religion : at Calicut (d) it is a maxim of the state that every religion is good.

But it does not follow from hence, that a religion brought from a far distant country, and quite different in climate, laws, manners, and customs, will have all the success to which its holiness might entitle it. This is more particularly true in great despotic empires : here strangers are tolerated at first, because there is no attention given to what does not seem to strike at the authority of the prince. As they are extremely ignorant, an European may render himself agreeable, by the knowledge he communicates : this is very well in the beginning. But as soon as he has any success, when disputes arise, and when men who have some interest become informed of it ; as their empire by its very nature, above all things requires tranquillity, and as the

(a) See Kempfer.

(b) Forbin's Memoirs.

(c) History of the Tartars, part 5.

(d) Pirard's Travels, c. 27.

the least disturbance may overturn it, they proscribe the new religion and those who preach it; disputes between the preachers breaking out, they begin to entertain a distaste for a religion, on which even those who propose it are not agreed.

BOOK XXVI.

Of Laws as relative to the Order of Things on which they determine.

CHAP. I.

Idea of this Book.

MEN are governed by several kinds of laws; by the law of nature; by the divine law, which is that of religion; by ecclesiastical, otherwise called canon law, which is that of religious polity; by the law of nations, which may be considered as the civil law of the universe, in which sense every nation is a citizen; by the general political law, whose object is that human wisdom which has been the foundation of all societies; by the particular political law, which relates to each society; by the law of conquest founded on this, that one nation has been willing and able, or has had a right to offer violence to another; by the civil law of every society, by which a citizen may defend his possessions and his life against the attacks of any other citizen; in fine, by domestic law, which proceeds from a society's being divided into several families, all which have need of a particular government.

There

There are therefore different orders of laws, and the sublimity of human reason consists in perfectly knowing to which of these orders the things that are to be determined ought to have a principal relation, and not to throw into confusion those principles which should govern mankind.

CHAP. II.

Of Laws Divine and Human.

WE ought not to decide by divine laws what should be decided by human laws ; nor determine by human, what should be determined by divine laws.

These two sorts of laws differ in their original, in their object, and in their nature.

It is universally acknowledged, that human laws are in their own nature different from those of religion ; this is an important principle : but this principle is itself subject to others, which must be enquired into.

1. It is in the nature of human laws to be subject to all the accidents which can happen, and to vary in proportion as the will of man changes : on the contrary, by the nature of the laws of religion, they are never to vary. Human laws appoint for some good ; those of religion for the best : good may have another object, because there are many kinds of good : but the best is but one, it cannot therefore change. We may change laws, because they are reputed no more than good ; but the institutions of religion are always supposed to be the best.

2. There are kingdoms, in which the laws are of no value, as they depend only on the capricious and fickle humour of the sovereign. If in these kingdoms the laws of religion were of the same nature as the human laws, the laws of religion too would be of no value. It is however necessary to the society, that it should have something fixed ; and it is religion that has this stability.

3. The

3. The influence of religion proceeds from its being believed; that of human laws, from their being feared. Antiquity suits with religion, because we have frequently a firmer belief of things in proportion to their distance: for we have no ideas annexed to them drawn from those times which can contradict them. Human laws, on the contrary, receive advantage from their novelty, which implies the actual and particular attention of the legislator to put them in execution.

CHAP. III.

Of Civil Laws contrary to the Law of Nature.

IF a slave, says Plato (a), defends himself, and kills a freeman, he ought to be treated as a parricide. This is a civil law which punishes self-defence, though dictated by nature.

The law of Henry VIII. which condemned a man, without being confronted by witnesses, was contrary to self-defence. In fact, in order to pass sentence of condemnation, it is necessary that the witnesses should know whether the man against whom they make their deposition is he whom they accuse, and that this man be at liberty to say, I am not the person you mean.

The law passed under the same reign, which condemned every woman who, having carried on a criminal commerce, did not declare it to the king before she married him, violated the regard due to natural modesty. It is as unreasonable to oblige a woman to make this declaration, as to oblige a man not to attempt the defence of his own life.

The law of Henry II. which condemned the woman to death who lost her child, in case she did not make known her pregnancy to the magistrate, was not less contrary to self-defence. It would have been sufficient to oblige her to inform one of her
nearest

(a) Lib. ix. on Laws.

nearest relations, who might watch over the preservation of the infant.

Gundebald (a) King of Burgundy decreed, that if the wife or son of a person guilty of robbery did not reveal the crime, they were to become slaves. This law was contrary to nature: a wife to inform against her husband! a son to accuse his father! to avenge one criminal action, they ordained another still more criminal.

There has been much talk of a law in * England, which permitted girls seven years old to chuse a husband. This law was shocking two ways; it had no regard to the time when nature gives maturity to the understanding, nor to the time when she gives maturity to the body.

Amongst the Romans, a father might oblige his daughter to repudiate (b) her husband, though he himself had consented to the marriage. But it is contrary to nature, for a divorce to be in the power of a third person.

A divorce can be agreeable to nature, only when it is by consent of the two parties, or at least of one of them: but when neither consents, it is a monstrous kind of divorce. In short, the power of divorcement can be given only to those who feel the inconveniencies of marriage, and who are sensible of the moment when it is for their interest to make them cease.

The law of (c) Recessuinthus permits the children of the adulteress, or those of her husband, to accuse her, and to put the slaves of the house to the torture. How iniquitous the law, which to preserve a purity of morals overturn nature, the origin, the source of all morality!

With pleasure we behold in our theatres a young hero express as much horror against the discovery of his mother-in-

VOL. II.

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(a) Law of the Burgundians, tit. 47.

* Mr Bayle, in his Criticism on the History of Calvinism, speaks of this law, page 163.

(b) See Law 5. in the code de repudiis & judicio de moribus sublato.

(c) In the code of the Visigoths, lib. iii, tit. 4. § 13.

law's guilt, as against the guilt itself. In his surprise, though accused, judged, condemned, proscribed, and covered with infamy, he scarcely dares to reflect on the abominable blood from which Phædra sprang; he abandons all that is most dear, the most tender object, all that lies nearest his heart, all that can fill him with rage, to deliver himself up to the unmerited vengeance of the gods. It is nature's voice, the sweetest of all sounds, that inspires us with this pleasure.

CHAP. IV.

Cases in which we may judge by the Principles of the Civil Law, in limiting the Principles of the Law of Nature.

AN Athenian law obliged * children to provide for their fathers, when fallen into poverty: it excepted those who were born of a (b) courtesan, those whose chastity had been infamously prostituted by their father, and those whom he (c) had not taught any trade by which they might gain a livelihood.

The law considered that in the first case the father being uncertain, he had rendered the natural obligation precarious; that, in the second, he had sullied the life he had given, and done the greatest injury he could do to his children in depriving them of their reputation; that in the third, he had rendered insupportable a life which had no means of subsistence. The law suspended the natural obligation of children, because the father had violated his: it looked upon the father and the son as no more than two citizens, and determined in respect to them only from civil and political views; ever considering, that

* Under pain of infamy, another under pain of imprisonment.

(b) Plutarch, life of Solon.

(c) Plutarch, life of Solon, and Gallienus in exort. ad. art. c. 8.

that a good republic ought to have particular regard to manners. I am of opinion that Solon's law was good in the two first cases; that in which nature leaves the son ignorant who is his father, and that where it in a manner directs he should not know him: but I cannot approve it in the third, where the father has only violated an obligation of the civil law.

CHAP. V.

That the Order of Succession or Inheritance, depends on the Principles of Political or Civil Law, and not on those of the Law of Nature.

THE Voconian law ordained, that no woman should be left heiress to an estate, not even if she was an only child. Never was there a law, says St Augustine (a), more unjust. A formula of Marculfus (b) treats that custom as impious, which deprives daughters of the right of succeeding to the estate of their fathers. Justinian (c) gives the appellation of barbarous, to the right which the males had formerly of succeeding in prejudice to the daughters. These notions proceed from their having considered the right of children to succeed to their father's possessions, as a consequence of the law of nature; which it is not.

The law of nature ordains, that fathers shall provide for their children; but it does not oblige them to make them their heirs. The division of property, the laws of this division, and the succession after the death of the person who has had this division, can be regulated only by the community, and consequently by political or civil laws.

It is true, that a political or civil order frequently demands that children should succeed to their father's estate; but it does not always make this necessary.

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There

(a) De civitate Dei, lib. iii.

(b) Lib. ii. chap. 12.

(c) Novel. 21.

There may be some reasons given why the laws of our fiefs appoint that the eldest of the males, or the nearest relations of the male side should have all, and the females nothing; and why by the laws of the Lombards (a), the sisters, the natural children, the other relations; and, in their default, the treasury might share the inheritance with the daughters.

It was regulated in some of the Dynasties of China, that the brothers of the emperor should succeed to the throne, and that the children should not. If they were willing that the prince should have a certain degree of experience, if they feared his being too young, and if it was become necessary to prevent eunuchs from placing children successively on the throne, they might very justly establish such an order of succession; and when some (b) writers have treated these brothers as usurpers, they have judged only from ideas received from the laws of their own countries.

According to the custom of Numidia (c), Desfalces, brother of Gala, succeeded to the kingdom; not Massinissa, his son.

There are monarchies merely elective; and since it is evident, that the order of succession ought to be derived from the political or civil laws, it is for these to decide in what cases it is agreeable to reason that the succession be granted to children, and in what cases it ought to be given to others.

In a kingdom of Arabia (d), the day the sovereign mounted the throne, they set guardians over all the pregnant women of the country, and the child who came first into the world was the heir apparent.

In countries where polygamy is established, the prince has many children; the number of them is much greater in some of these countries than in others. There are * states, where it is

(a) Lib. ii. tit. 14. §. 6. 7. & 8.

(b) Du Halde on the 2d Dynasty.

(c) Livy, Decad. iii. lib. 9.

(d) Strabo, lib. xvi.

* As at Lovengo in Africa. See the Collection of Voyages that contributed to the establishment of an East India Company, vol iv. part 1. page 114.

is impossible for the people to maintain the children of the king : they might therefore make it a law, that the crown shall devolve, not on the king's children, but on those of his sister.

A prodigious number of children would expose the state to the most dreadful civil wars. The order of succession which gives the crown to the children of the sister, the number of whom is not larger than those of a prince who has only one wife, must prevent these inconveniencies.

There are people amongst whom reasons of state, or some maxims of religion, have made it necessary that the crown should be always fixed in a certain family : from hence, in India, proceeds the jealousy of their (a) tribes, and the fear of losing the descent ; they have there conceived, that never to want princes of the blood-royal, they ought to take the children of the eldest sister of the king.

A general maxim : It is an obligation of the law of nature, to provide for our children ; but to make them our successors, is an obligation of the civil or political law. From hence are derived the different regulations, with respect to bastards, in the different countries of the world ; these are according to the civil or political laws of each country.

CHAP. VI.

That we ought not to decide by the Precepts of Religion, what belongs only to the Law of Nature.

THE Abassines have a most severe lent of fifty days, which weakens them to such a degree, that for a long time they are incapable of business : the Turks (b) do not fail to attack them after their lent. Religion ought, in favour of the natural right of self-defence, to set bounds to these customs.

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(a) See Edifying Letters, l. 14. and the Voyages that contributed to the establishment of an East-India Company, vol. iii. part 2. page 644.

(b) Collection of Voyages, that contributed to the establishment of an East-India Company, vol. iv. page 35. and 103.

The Jews were obliged to keep the sabbath ; but it was an instance of great stupidity in this nation, not to defend themselves when their enemies chose to attack them on this day. Cambyfes laying siege to Pelusium, set in the first rank a great number of those animals which the Ægyptians regard as sacred ; the consequence was, that the soldiers of the garrison durst not molest them. Who does not see that self-defence is a duty superior to every precept ?

CHAP. VII.

That we ought not to regulate by the Principles of the Canon Law, things which should be regulated by those of the Civil Law.

BY the (a) civil law of the Romans, he who took a thing privately from a sacred place, was punished only for the guilt of theft : by the (b) canon law, he is punished for the crime of sacrilege. The canon law takes cognizance of the place, the civil law of the fact. But to attend only to the place, is neither to reflect on the nature and definition of a theft, nor on the nature and definition of sacrilege.

As the husband may demand a separation, by reason of the infidelity of his wife ; the wife might formerly (c) demand it, on account of the infidelity of the husband. This custom, contrary to a regulation made in the (d) Roman laws, was introduced into the ecclesiastic courts, where nothing was regarded but the maxims of canon law ; and indeed, if we consider marriage as a thing merely spiritual, and as relating only to the things of another life, the violation is in both cases the same. But the political and civil laws of almost all nations, have with reason made a distinction between them. They have required from

(a) Leg. 5. ff. ad leg. Juliam peculatus.

(b) Capite quisquis 17. questione 4. Cujus observat. lib. xiii. cap. 19. tom. iii.

(c) Beaufmanoir on the ancient customs of Beauvoisis, cap. 18.

(d) Law of the first Code, ad leg. Juliam de adulteriis.

from the women a degree of reserve and continency, which they have not exacted from the men; because, in women, a violation of chastity supposes a renunciation of all virtue; because women, by violating the laws of marriage, quit the state of their natural dependence; because nature has marked the infidelity of women with certain signs; and, in fine, because the children of the wife born in adultery, necessarily belong, and are an expence to the husband, while the children produced by the adultery of the husband, are not the wife's, nor are an expence to the wife.

CHAP. VIII.

That things which ought to be regulated by the Principles of Civil Law, can seldom be regulated by those of Religion.

THE laws of religion have a greater sublimity, the civil laws a greater extent.

The laws of perfection drawn from religion have more in view the goodness of the person that observes them, than of the society in which they are observed: the civil laws, on the contrary, have more in view the moral goodness of men in general, than that of individuals.

Thus, venerable as those ideas are which immediately spring from religion, they ought not always to serve as a first principle to the civil laws; because these have another, the general welfare of society.

The Romans made regulations amongst themselves, to preserve the morals of their women; these were political institutions. Upon the establishment of monarchy, they made civil laws on this head, and formed them on the principles of their civil government. When the Christian religion became predominant, the new laws that were then made had less relation to the general rectitude of morals, than to the holiness of marriage; they had less regard to the union of the two sexes in a civil, than in a spiritual state.

At

At first, by the (a) Roman law, a husband who brought back his wife into his house, after she had been found guilty of adultery, was punished as an accomplice in her debauch. Justinian (b) from other principles ordained, that during the space of two years he might go and take her again out of the monastery.

Formerly, when a woman whose husband was gone to war, heard no longer any tidings of him, she might easily marry again, because she had in her hands the power of making a divorce. The laws of Constantine (c) obliged the woman to wait four years, after which she might send the bill of divorce to the general; and, if her husband returned, he could not then charge her with adultery. But Justinian (d) decreed, that let the time be ever so long after the departure of her husband, she should not marry, unless by the deposition and oath of the general she could prove the death of her husband. Justinian had in view the indissolubility of marriage; but we may safely say, that he had it too much in view. He demanded a positive proof, when a negative proof was sufficient; he required a thing extremely difficult, to give an account of the fate of a man at a great distance, and exposed to so many accidents; he presumed a crime, that is, a desertion of the husband, when it was so natural to presume his death. He injured the commonwealth, by obliging women to live out of marriage; he injured individuals, by exposing them to a thousand dangers.

The law of Justinian (e), which ranked amongst the causes of divorce the consent of the husband and wife to enter into a monastery, was entirely opposite to the principles of the civil laws. It is natural that the causes of divorce should have their origin

(a) Leg. 11. §. ult. ff. ad. leg. Juliam de adulteriis.

(b) Nov. 134. Coll. ix. cap. 10. tit. 170.

(c) Leg. 7. de repudiis & judicio de morib. sublato.

(d) Auth. hodie quantiscumque Cod. de repudiis.

(e) Auth. quod hodie Cod. de repudiis.

origin in certain impediments, which could not be foreseen before marriage; but this desire of preserving chastity might be foreseen, since it is in ourselves. This law favours inconstancy in a state, which is by its very nature perpetual; it shocks the fundamental principle of divorce, which permits the dissolution of one marriage only from the hope of another. In short, if we view it in a religious light, it is no more than giving victims to God without a sacrifice.

CHAP. IX.

In what case we ought to follow the Civil Law which permits, and not the Law of Religion which forbids.

WHEN a religion which prohibits polygamy is introduced into a country where it is permitted, we cannot believe (speaking only as a politician) that the laws of the country ought to suffer a man who has many wives to embrace this religion; unless the magistrate or the husband should indemnify them, by restoring them some way or other to their civil state. Without this their condition would be deplorable; no sooner would they obey the laws, than they would find themselves deprived of the greatest advantages of society.

CHAP. X.

That human Courts of Justice should not be regulated by the Maxims of those Tribunals which relate to the other life.

THE tribunal of the inquisition, formed by the christian monks on the idea of the tribunal of penitence, is contrary to all good policy. It has every where met with a general dislike, and must have sunk under the oppositions it met with, if those who were resolved to establish it, had not drawn advantages even from these oppositions.

This tribunal is insupportable in all governments. In monarchies, it only makes informers and traitors ; in republics, it only forms dishonest men ; in a despotic state, it is as destructive as the government itself.

It is one abuse of this tribunal, that of two persons accused of the same crime, he who denies is condemned to die, and he who confesses avoids the punishment. This has its source in monastic ideas, where he who denies seems in a state of impenitence and damnation ; and he who confesses in a state of repentance and salvation. But a distinction of this kind can have no relation to human tribunals. Human justice, which sees only the actions, has but one compact with men, namely that of innocence ; divine justice, which sees the thoughts, has two, that of innocence and repentance.

CHAP. XI.

In what cases, with regard to Marriages, we ought to follow the Laws of Religion, and in what cases we should follow the Civil Laws.

IT has happened in all ages and countries, that religion has been blended with marriages. When certain things have been considered as impure or unlawful, and were nevertheless become necessary, they were obliged to call in religion, to legitimate in the one case, and to reprove in others.

On the other hand, as marriage is of all human actions that in which society is most interested, it became proper that this should be regulated by the civil laws.

Every thing which relates to the nature of marriage, its form, the manner of contracting it, the fruitfulness it occasions, which has made all nations consider it as the object of a particular benediction ; a benediction which not being always annexed to it, is supposed to depend on certain superior graces : all this, I say, is within the resort of religion.

The

The consequences of this union, with regard to property, the reciprocal advantages, every thing which has a relation to the new family, to that from which it sprung, and to that which is expected to arise; all this relates to the civil laws.

As one of the great objects of marriage is to take away that uncertainty which attends unlawful conjunctions, religion here stamps its seal, and the civil laws join theirs to it; to the end that it may be as authentic as possible. Thus, besides the conditions required by religion to make a marriage valid, the civil laws may still exact others.

The civil laws receive this power from their being additional obligations, and not contradictory ones. The law of religion insists upon certain ceremonies, the civil laws on the consent of fathers: in this case they demand something more than that of religion, but they demand nothing contrary to it.

It follows from hence, that the religious law must decide whether the bond be indissoluble, or not; for if the laws of religion had made the bond indissoluble, and the civil laws had declared it might be broken, they would be contradictory to each other.

Sometimes the regulations made by the civil laws with respect to marriage, are not absolutely necessary; such are those established by the laws, which, instead of annulling the marriage, only punish those who contract it.

Amongst the Romans, the Papian law declared those marriages illegal which had been prohibited, and yet only subjected them to a penalty*; but a *Senatus-consultum*, made at the instance of the Emperor Marcus Antoninus, declared them void; there then no longer subsisted† any such thing as a marriage, wife, dowry, or husband. The civil laws determine according to circumstances: sometimes they are most attentive to repair the evil; at others to prevent it.

* See what hath been said on this subject in Book xxiii. Chap. xx.

† See Law 16. ff. de ritu nuptiarum; and law 3. §. 1. also Digest, de donationibus inter virum & uxorem.

CHAP. XII.

In what instances Marriages between Relations should be regulated by the Laws of Nature, and in what instances by the Civil Laws.

WITH regard to the prohibition of marriage between relations, it is a thing extremely delicate, to fix exactly the point at which the laws of nature stop, and where the civil laws begin. For this purpose we must establish some principles.

The marriage of the son with the mother confounds the state of things; the son ought to have an unlimited respect to his mother, the wife owes an unlimited respect to her husband; therefore the marriage of the mother to her son, would subvert the natural state of both.

Besides, nature has forwarded in women the time in which they are able to have children, but has retarded it in men: and, for the same reason, women sooner lose this ability, and men later. If the marriage between the mother and the son was permitted, it would almost always be the case, that when the husband was capable of entering into the views of nature, the wife would be incapable.

The marriage between the father and the daughter is contrary to nature, as well as the other; but it is less contrary, because it has not these two obstacles. Thus the Tartars, who may marry their daughters *, never marry their mothers, as we see in the accounts we have of that nation (a).

It has ever been the natural duty of fathers to watch over the chastity of their children. Intrusted with the care of their education,

* This law is very ancient amongst them. Attila, says Priscus in his embassy, stopt in a certain place to marry Esca his daughter. A thing permitted, he adds, by the laws of the Scythians, p. 22.

(a) Hist. of the Tartars, Part 3. p. 236.

education, they are obliged to preserve the body in the greatest perfection, and the mind from the least corruption; to encourage whatever has a tendency to inspire them with virtuous desires, and to nourish a becoming tenderness. Fathers, always employed in preserving the morals of their children, must have a natural aversion to every thing that can render them corrupt. Marriage, you will say, is not a corruption: but before marriage they must speak, they must make their persons beloved, they must seduce: it is this seduction which ought to inspire us with horror.

There should be therefore an insurmountable barrier between those who ought to give the education, and those who are to receive it, in order to prevent every kind of corruption, even though the motive be lawful. Why do fathers so carefully deprive those who are to marry their daughters, of their company and familiarity?

The horror that arises against the incest of the brother with the sister should proceed from the same source. The desire of fathers and mothers to preserve the morals of their children and families untainted, is sufficient to inspire their offspring with a detestation of every thing that can lead to the union of the two sexes.

The prohibition of marriage between cousin-germans, has the same original. In the early ages, that is, in the times of innocence; in the ages when luxury was unknown, it was customary for children * upon their marriage, not to remove from their parents, but to settle in the same house; as a small habitation was at that time sufficient for a large family, the children † of two brothers, or cousin-germans, were considered both by others and themselves as brothers. The estrangement then between

* It was thus amongst the ancient Romans.

† Amongst the Romans they had the same name, the cousin-germans were called brothers.

tween the brothers and sisters, as to marriage †, subsisted also between the cousin-germans.

These principles are so strong and so natural, that they have had their influence almost all over the earth, independently of any communication. It was not the Romans who taught the inhabitants of Formosa (a), that the marriage of relations of the fourth degree was incestuous; it was not the Romans that communicated this sentiment to the Arabs (b); it was not they who taught it to the inhabitants of the Maldivian islands (c.)

But if some nations have not rejected marriages between fathers and children, sisters and brothers, we have seen in the first book, that intelligent beings do not always follow the law of nature. Who could have imagined it! Religious ideas have frequently made men fall into these mistakes. If the Assyrians and the Persians married their mothers, the first were influenced by a religious respect for Semiramis, and the second did it because the religion of Zoroaster gave a preference || to these marriages. If the Egyptians married their sisters, it proceeded from the wildness of the Egyptian religion, which consecrated these marriages in honour of Isis. As the spirit of religion leads us to attempt whatever is great and difficult, we cannot infer that a thing is natural from its being consecrated by a false religion.

The principle which informs us that marriages between fathers and children, between brothers and sisters, are prohibited, in order to preserve natural modesty in families, will help us to the discovery of those marriages that are forbidden by the law of nature, and of those which can be so only by the civil law.

As

† It was thus at Rome in the first ages, till the people made a law to permit them; they were willing to favour a man extremely popular, who had married his cousin-german. Plutarch's Treatise, entitled, Questions concerning the affairs of the Romans.

(a) Collection of voyages to the Indies. Vol. 5. Part 1. an account of the state of the isle of Formosa.

(b) Koran, chap. of women.

(c) See Francis Pirard.

|| They were considered as more honourable. See Philo de specialibus legib. quæ pertinent ad precepta Decalogi. Paris 1640, 778.

As children dwell, or are supposed to dwell in their father's house, and consequently the step-son with the step-mother, the step-father with the step-daughter, or wife's daughter, the marriage between them is forbidden by the law of nature. In this case the resemblance has the same effect as the reality, because it springs from the same cause: the civil law neither can, nor ought to permit these marriages.

There are nations, as we have already observed, amongst whom cousin-germans are considered as brothers, because they commonly dwell in the same house; there are others, where this custom is not known. Among the first, the marriage of cousin-germans ought to be regarded as contrary to nature; not so among the others. But the laws of nature cannot be local. Wherefore, when these marriages are forbidden, or permitted, they are, according to the circumstances, permitted or forbidden by a civil law.

It is not a necessary custom for the brother-in-law and the sister-in-law to dwell in the same house. The marriage between them is not then prohibited to preserve chastity in the family; and the law which forbids or permits it, is not a law of nature, but a civil law, regulated by circumstances, and dependant on the customs of each country; these are cases in which the laws depend on the morals, or customs of the inhabitants.

The civil laws forbid marriages, when by the customs received in a certain country they are found to be in the same circumstances as those forbidden by the law of nature; and they permit them when this is not the case. The prohibitions of the laws of nature are invariable, because the thing on which they depend is invariable; the father, the mother, and the children, necessarily dwell in the same house. But the prohibitions of the civil laws are accidental, because they depend on an accidental circumstance; cousin-germans and others dwelling in the house by accident.

This

This explains why the laws of Moses, those of the Egyptians (a), and of many other nations, permitted the marriage of the brother-in-law with the sister-in-law ; whilst these very marriages were disallowed by other nations.

In the Indies they have a very natural reason for admitting this sort of marriages. The uncle is there considered as the father, and is obliged to maintain and educate his nephew, as if he was his own child : this proceeds from the disposition of these people, which is good natured and full of humanity. This law, or this custom, has produced another ; if a husband has lost his wife, he does not fail to marry her sister : and this is extremely natural, for his new consort becomes the mother of her sister's children, and not a cruel step-mother.

CHAP. XIII.

That we should not regulate by the Principles of Political Law, those things which depend on the Principles of Civil Law.

AS men have given up their natural independence to live under political laws, they have given up the natural community of goods to live under civil laws.

By the first, they acquired liberty ; by the second, property. We ought not to decide by the laws of liberty, which, as we have already said, is only the government of the community, what ought to be decided by the laws concerning property. It is a paralogism to say, that the good of the individual ought to give way to that of the republic : this can never take place, but when the government of the community, or, in other words, the liberty of the subject is concerned ; this does not affect those cases which relate to private property, because the public good consists in every one's having that property, which was given him by the civil laws, invariably preserved.

Cicero.

(a) See Law 8. of the Code de incestis & inutilibus nuptiis.

Cicero maintains that the Agrarian laws were unjust ; because the community was established with no other view, but that every one might be able to preserve his property.

Let us therefore lay down as a certain maxim, that whenever the public good happens to be the matter in question, it is never for the advantage of the public to deprive an individual of his property, or even to retrench the least part of it by a law, or a political regulation. In this case we should follow the rigour of the civil law, which is the Palladium of property.

Thus, when the public has occasion for the estate of an individual, it ought never to act by the rigour of political law : it is here that the civil law ought to triumph, who with the eyes of a mother regards every individual as the whole community.

If the political magistrate would erect a public edifice, or make a new road, he must indemnify those who are injured by it ; the public is in this respect like an individual, who treats with an individual. It is full enough, that it can oblige a citizen to sell his inheritance, and that it can strip him of this great privilege which he holds from the civil law, the not being forced to alienate his possessions.

After the nations which subverted the Roman empire had abused their very conquests, the spirit of liberty called them back to that of equity. They exercised the most barbarous laws with moderation : and if any one should doubt the truth of this, they need only read Beaumanoir's admirable work on Jurisprudence, written in the twelfth century.

They mended the highways in his time, as we do at present. He says, that when a highway could not be repaired, they made a new one as near the old as possible ; but indemnified the proprietors at the * expence of those who reaped any advantage from the road. They determined at that time by the civil law ; in our days, we determine by the law of politics.

* The Lord appointed collectors to receive the toll from the peasant ; the gentlemen were obliged to contribute by the count, and the clergy by the bishop. Beaumanoir, chap. xxii.

CHAP. XIV.

That we ought not to decide by the rules of the Civil Law, when it is proper to decide by those of the Political Law.

MOST difficulties on this subject may be easily solved, by not confounding the rules derived from property with those which spring from liberty.

Is the demesne of a state or government alienable, or is it not? This question ought to be decided by the political law, and not by the civil. It ought not to be decided by the civil law, because it is as necessary that there should be demesnes for the subsistence of a state, as that the state should have civil laws to regulate the disposal of property.

If then they alienate the demesne, the state will be forced to make a new fund for another. But this expedient overturns the political government, because, by the nature of the thing, for every demesne that shall be established, the subject will always be obliged to pay more, and the sovereign to receive less; in a word, the demesne is necessary, and the alienation is not.

The order of succession is, in monarchies, founded on the welfare of the state, which makes it necessary that this order should be fixed, to avoid the misfortunes, which, I have said, must arise in a despotic kingdom, where all is uncertain because all is arbitrary.

The order of the succession is not fixed for the sake of the reigning family; but because it is the interest of the state that it should have a reigning family. The law which regulates the succession of individuals is a civil law, whose view is the interest of individuals; that which regulates the succession to monarchy, is a political law, which has in view the welfare and preservation of the kingdom.

It follows from hence, that when the political law has established an order of succession in a kingdom, and this order is
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at an end, it is absurd to reclaim the succession in virtue of the civil law of any nation whatsoever. One particular society does not make laws for another society. The civil laws of the Romans were no more applicable than any other civil laws. They themselves did not make use of them, when they proceeded against kings: and the maxims by which they judged kings are so abominable, that they ought never to be revived.

It follows also from hence, that when the political law has obliged a family to renounce the succession, it is absurd to insist upon the restitutions drawn from the civil law. Restitutions are in the law, and may be good against those who live in the law: but they are not proper for such as have been raised up for the law, and who live for the law.

It is ridiculous to pretend to decide the rights of kingdoms, of nations, and of the universe, by the same maxims on which (to make use of an expression of (a) Cicero) we should decide the right of a gutter between individuals.

Ostracism ought to be examined by the rules of the political, and not by those of the civil law; and so far is this custom from rendering a popular government odious, that it is, on the contrary, extremely adapted to prove its lenity. We should be sensible of this ourselves, if, while banishment is always considered amongst us as a penalty, we were able to separate the idea of ostracism from that of punishment.

Aristotle (b) tells us, that it is universally allowed that this practice has something in it both humane and popular. - If in those times and places where this sentence was executed, they found nothing in it that appeared odious; is it for us, who see things at such a distance, to think otherwise than the accusers, the judges, and the accused themselves?

Y 2

And

(a) Lib. I. of Laws.

(b) Repub. lib. iii. cap. 13.

And if we consider that this judgment of the people loaded the person with glory on whom it was passed; that when at Athens it fell upon a man without (z) merit, from that very moment they ceased to * use it; we shall find that numbers of people have entertained a false idea of it, and that it was an admirable law which could prevent the ill consequences which the glory of a citizen might produce, by loading him with new glory.

CHAP. XV.

That it is necessary to enquire, whether the Laws which seem contradictory are of the same class.

AT Rome the husband was permitted to lend his wife to another. Plutarch tells us this (a) in express terms. We know that Cato lent his (b) wife to Hortensius, and Cato was not a man to violate the laws of his country.

On the other hand, a husband who suffered his wife to be debauched, who did not bring her to justice, or who took her again after her (c) condemnation, was punished. These laws seem to contradict each other, and yet are not contradictory. The law which permitted a Roman to lend his wife, was visibly a Lacedæmonian institution, established with a view of giving the republic children of a good species, if I may be allowed the term: the other had in view the preservation of morals. The first was a law of politics, the second a civil law.

CHAP.

* It was found opposite to the spirit of the legislator.

(z) Hyperbolus, see Plutarch, life of Aristides.

(a) Plutarch, in his comparison between Lycurgus and Numa.

(b) Plutarch, life of Cato.

(c) Leg. 11. §. ult. ff. ad leg. Jul. de adulteriis.

CHAP. XVI.

That we ought not to decide those things by the Civil Law, which ought to be decided by domestic Laws.

THE law of the Visigoths enjoins, that the (d) slaves of the house shall be obliged to bind the man and woman they surprize in adultery, and to present them to the husband and to the judge: a terrible law, which puts into the hands of such mean persons the care of public, domestic, and private vengeance!

This law can be no where proper but in the seraglio's of the east, where the slave who has the charge of the inclosure, is deemed an accomplice upon the discovery of the least infidelity. He seizes the criminals, not so much with a view to bring them to justice, as to do justice to himself, and to obtain a scrutiny into the circumstances of the action, in order to remove the suspicion of his negligence.

But, in countries where women are not guarded, it is ridiculous to subject those who govern the family to the inquisition of their slaves.

This inquisition may, in certain cases, be at the most a particular domestic regulation, but never a civil law.

CHAP. XVII.

That we ought not to decide by the Principles of the Civil Laws, those things which belong to the Law of Nations.

LIBERTY consists principally in not being forced to do a thing where the laws do not oblige: People are in this state

(d) Law of the Visigoths, lib. iii. tit. 4. §. 6.

state, only as they are governed by civil laws, and because they live under those civil laws, they are free.

It follows from hence, that princes who live not among themselves under the civil laws, are not free; they are governed by force; they may continually force, or be forced. From hence it follows, that treaties made by force are as obligatory as those made by free consent. When we, who live under civil laws, are, contrary to law, constrained to enter into a contract, we may, by the assistance of the law, recover from the effects of violence: but a prince, who is always in that state in which he forces or is forced, cannot complain of a treaty which he has been obliged by violence to enter into. This would be to complain of his natural state; it would seem as if he would be a prince with respect to other princes, and as if other princes should be subjects with respect to him; that is, it would be contrary to the nature of things.

CHAP. XVIII.

That we should not decide by Political Laws, things which belong to the Law of Nations.

POLITICAL laws demand that every man be subject to the criminal and civil courts of the country where he resides, and to the censure of the sovereign.

The law of nations requires, that princes shall send ambassadors; and a reason drawn from the nature of things does not permit these ambassadors to depend either on the sovereign to whom they are sent, or on his tribunals. They are the voice of the prince who sends them, and this voice ought to be free; no obstacle should hinder the execution of their office: they may frequently offend, because they speak for a man entirely independent; they might be wrongfully accused of crimes if they were liable to be punished for crimes; if they could be arrested

arrested for debts, these might be forged. Thus a prince who has naturally a bold and enterprising spirit, would speak by the mouth of a man who had every thing to fear. We must then be guided, with respect to ambassadors, by reasons drawn from the law of nations, and not by those derived from political law. But if they make an ill use of their representative character, a stop may be put to it by sending them back. They may even be accused before their master, who by this means becomes either their judge or their accomplice.

CHAP. XIX.

The unhappy state of the Inca Athualpa.

THE principles we have just been establishing were cruelly violated by the Spaniards. The Inca Athualpa (a) could only be tried by the law of nations; they tried him by political and civil laws; they accused him for putting to death some of his own subjects, for having many wives, &c. and to fill up the measure of their stupidity, they condemned him, not by the political and civil laws of his own country, but by the political and civil laws of theirs.

CHAP. XX.

That when, by some circumstance, the Political Law becomes destructive to the State, we ought to decide by such a Political Law as will preserve it, which sometimes becomes a Law of Nations.

WHEN that political law which has established in the kingdom a certain order of succession, becomes destructive to the body politic for whose sake it was established, there is not the

(a) See Garcillaso de la Vega.

the least room to doubt but another political law may be made to change this order; and so far would this law be from opposing the first, it would in the main be entirely conformable to it, since both would depend on this principle, that *The safety of the people is the supreme law.*

I have said * that a great state becoming accessory to another, is itself weakened, and even weakens the principal. We know that it is for the interest of the state to have the supreme magistrate within itself, that the public revenues be well administered, that its specie be not sent abroad to enrich another country. It is of importance, that he who is to govern has not imbibed foreign maxims: These are less agreeable than those already established. Besides, men have an extravagant fondness for their own laws and customs: These constitute the happiness of every community; and as we learn from the histories of all nations, are rarely changed without violent commotions, and a great effusion of blood.

It follows from hence, that if a great state has to its heir the possessor of a great state, the first may reasonably exclude him, because a change in the order of succession must be of service to both states. Thus a law of Russia made in the beginning of the reign of Elizabeth, most wisely excluded from the possession of the crown, every heir who possessed another monarchy: thus the law of Portugal disqualifies every stranger who lays claim to the crown by right of blood.

But if a nation may exclude, it may with greater reason be allowed a right to oblige a prince to renounce. If the people fear that a certain marriage will be attended with such consequences as shall rob the nation of its dependence, or dismember some of its provinces, it may very justly oblige the contractors

* Book 8. chap. 17. & seq.

tors and their descendants to renounce all right over them ; while he who renounces, and those to whose prejudice he renounces, have the less reason to complain, as the state might originally have made a law to exclude them.

CHAP. XXI.

The Regulations of the Police are of a different class from other Civil Laws.

THERE are criminals whom the magistrate punishes ; there are others whom he reclaims. The first are subject to the power of the law, the others to his authority : those are cut off from society ; these they oblige to live according to the rules of society.

In the exercise of the Police, it is rather the magistrate who punishes than the law ; in the sentence past on crimes, it is rather the law which punishes than the magistrate. The business of the Police consists of affairs which arise every instant, and are commonly of a trifling nature : there is then but little need of formalities. The actions of the Police are quick, they are exercised over things which return every day ; it would be therefore improper for it to inflict severe punishments. It is continually employed about minute particulars ; great examples are therefore not designed for its purpose. It is governed rather by regulations than laws ; those who are subject to its jurisdiction are incessantly under the eye of the magistrate : it is therefore the fault of the magistrate if they fall into excess. Thus we ought not to confound a flagrant violation of the laws with a simple breach of the Police ; these things are of a different order.

From hence it follows, that the laws of the Italian † republic, where bearing fire-arms is punished as a capital crime, and

VOL. II.

Z

where

† Venice.

where it is not more fatal to make an ill use of them than to carry them, is not agreeable to the nature of things.

It follows moreover, that the applauded action of that Emperor, who caused a baker to be impaled whom he found guilty of a fraud, was the action of a sultan, who knew not how to be just, without committing an outrage on justice.

CHAP. XXII.

That we should not follow the general dispositions of the Civil Law, in things which ought to be subject to particular rules drawn from their own nature.

IS it a good law, that all civil obligations passed between sailors in a ship in the course of a voyage should be null? Francis Pirard (a) tells us, that in his time it was not observed by the Portuguese, though it was by the French. Men who are together only for a short time, who have no wants, since they are provided for by the prince, who have only one object in view, that of their voyage; who are no longer in society, but are only the inhabitants of a ship, ought not to contract obligations that were never introduced, but to support the burden of civil society.

In the same spirit was the law of the Rhodians, made at a time when they always followed the coasts; it ordained that those who during a tempest staid in a vessel, should have ship and cargo, and those who quitted it should have nothing.

BOOK

(a) Chap. 14. p. 12.

BOOK XXVII.

Of the Origin and Revolutions of the Roman Laws on Successions.

CHAP. I.

Of the Roman Laws on Successions.

THIS affair derives its establishment from the most distant antiquity; and to penetrate to its foundation, permit me to search among the first laws of the Romans, for what, I believe, nobody yet has been so happy as to discover.

We know that Romulus (a) divided the land of his little kingdom among his subjects; it seems to me, that from hence the laws of Rome on successions were derived.

The law of the division of lands made it necessary that the property of one family should not pass into another: from hence it followed, that there were but two orders of heirs established by law *, the children of all the descendants that were not emancipated, but lived under the power of the father, whom they called *sui hæredes*, or his natural heirs: and in their default, the nearest relations on the male side, whom they called *Agnati*.

It followed likewise, that the relations on the female side, whom they called *Cognati*, ought not to succeed; they would

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have

(a) Dionys. Halicar. lib. 2. c. 3. Plutarch, comparison between Numa and Lycurgus.

* *At si intestato moritur cui suus hæres nec extabit, agnatus proximus familiam habeto.* Fragment of the law of the twelve tables in Ulpian, the last title.

have conveyed the estate into another family, which was not allowed.

From thence also it followed, that the children ought not to succeed to the mother, nor the mother to her children; for this might carry the estate of one family into another. Thus we see them excluded (g) by the law of the twelve tables; it called none to the succession but the *Agnati*, and there was no agnation between the son and the mother.

But it was indifferent whether the *suus hæres*, or, in default of such, the nearest by agnation, was male or female; because, as the relations on the mother's side could not succeed, though a woman who was an heiress should happen to marry, yet the estate always returned into the family from whence it came. On this account the law of the twelve tables does not distinguish, whether the person (a) who succeed was male or female.

This was the cause, that though the grandchildren by the son succeeded to the grandfather, the grandchildren by the daughter did not succeed; for, to prevent the estate from passing into another family, the *Agnati* were preferred before them.

Hence the daughter, and not her (b) children, succeeded to the father.

Thus amongst the primitive Romans the women succeeded, when this was agreeable to the law of the division of lands; and they did not succeed when this law might suffer by it.

Such were the laws of succession among the primitive Romans; and as these had a natural dependance on the constitution, and were derived from the division of lands, it is easy to perceive that they had not a foreign original, and were not of the number of those brought into the republic by the deputies sent into the cities of Greece.

Dionysius Halicarnassæus (c) tells us, that Servius Tullius finding the laws of Romulus and Numa on the division of
lands

(g) See the Fragment of Ulpian, § 8. tit. 26. Inst. tit. 3. in præmio ad S. C. Tertullianum.

(a) Paulus, lib. 4. sent. tit. 8. § 3.

(b) Inst. tit. lib. 3.

(c) Lib. 4. p. 276.

lands abolished, he restored them, and made new ones, to give the old a greater weight. We cannot therefore doubt, but that the laws we have been speaking of, made in consequence of this division, were the work of these three Roman legislators.

The order of succession having been established in consequence of a political law, no citizen was allowed to break in upon it by his private will; that is, in the first ages of Rome, he had not the power of making a testament. Yet it would have been hard to deprive him, in his last moments, of the friendly commerce of kind and beneficent actions.

They therefore found a method of reconciling, in this respect, the laws with the desires of the individual. He was permitted to dispose of his substance in an assembly of the people, and thus every testament was in some sort an act of the legislative power.

The law of the twelve tables permitted the person who made his will, to chuse which citizen he pleased for his heir. The reason that induced the Roman laws so strictly to restrain the number of those who might succeed *ab intestato*, was the law of the division of lands; and the reason why they extended so widely the power of the testator, was, that as the father might sell † his children, he might with greater reason deprive them of his substance. These were therefore different effects, since they flowed from different principles; and such is, in this respect, the spirit of the Roman laws.

The ancient laws of Athens did not permit a citizen to make a will. Solon (a) permitted it, with an exception to those who had children: and the legislators of Rome, filled with the idea of paternal power, permitted the making a will even to the prejudice of their children: It must be confessed, that the ancient laws of Athens were more consistent than those of Rome. The
indefinite

† Dionysius Halicarnassensis proves by a law of Numa, that the law which permitted a father to sell his son three times, was made by Romulus, and not by the Decemvirs. lib. 2.

(a) See Plutarch, life of Solon.

indefinite permission of making a will, which had been granted to the Romans, ruined by little and little the political regulation on the divisions of lands; it was the principal thing that introduced the fatal difference between riches and poverty: many shares were united in the same person; some citizens had too much, and a multitude of others had nothing. Thus the people being continually deprived of their shares, were incessantly calling out for a new distribution of lands. They demanded it in an age when the frugality, the parsimony, and the poverty of the Romans were their distinguishing characteristic; as well as at a time when their luxury was become still more astonishing.

Testaments being properly a law made in the assembly of the people, those who were in the army were thereby deprived of a testamentary power. The people therefore gave the soldiers the privilege * of making, before their companions, the dispositions which † should have been made before them.

The great assembly of the people met but twice a-year; besides, both the people and the affairs brought before them were increased; they therefore judged it convenient to permit all the citizens to make their ‡ will before some Roman citizens of ripe age, who were to represent the body of the people: they took five (a) citizens, before whom the inheritor (b) purchased his family, that is, his inheritance, of the testator; another citizen brought a pair of scales to weigh the value; for the Romans || as yet had no money.

To

* This testament, called in *procinctu*, was different from that which they called military, which was established only by the constitutions of the emperors. Leg. 1. ff. de milit. test. This was one of the artifices by which they cajoled the foldiers.

† This testament was not in writing, and it was without formality, *sine libra & tabulis*, as Cicero says, lib. i. de Oratore.

‡ Institut. lib. ii. tit. 10. §. 1. Aulus Gellius, lib. xv. cap. 27. They called this form of testament *pér æs & libram*.

(a) Ulpian, tit. 10. §. 2.

(b) Theoph. Inst. lib. ii. tit. 10.

|| T. Livy, lib. iv. *nondum argentum signatum erat*. He speaks of the time of the siege of Veii.

To all appearance these five citizens were to represent the five classes of the people ; and they set no value on the sixth, as being composed of men who had no property.

We ought not to say, with Justinian, that these sales were merely imaginary ; they became, indeed, imaginary in time, but were not so originally. Most of the laws which afterwards regulated wills, were built on the reality of these sales : we find sufficient proof of this in the fragments of Ulpian (a). The deaf, the dumb, the prodigal, could not make a will ; the deaf, because he could not hear the words of the buyer of the inheritance ; the dumb, because he could not pronounce the terms of nomination ; the prodigal, because, as he was excluded from the management of all affairs, he could not sell his inheritance. I omit any further examples.

Wills being made in the assembly of the people, were rather the acts of political than of civil laws, a public rather than a private right ; from whence it followed that the father, while his son was under his authority, could not give him leave to make a will.

Wills, among most nations, are not subject to greater formalities than ordinary contracts ; because both the one and the other are only expressions of the will of him who makes the contract, and both are equally a private right. But, among the Romans, where testaments were derived from the public law, they were attended with much greater formalities (b) than other affairs ; and this is still the case in those provinces of France which are governed by the Roman law.

Testaments being, as I have said, a law of the people, they ought to be made with the force of a command, and in such terms as are called *direct and imperative* *. Hence a rule was formed, that they could neither give nor transmit an inheritance,

(a) Tit. 20. §. 13.

(b) Instit. lib. ii. tit. 10. §. 1.

* Let Titius be my heir.

tance, without making use of the imperative words : from whence it followed, that they might very justly in certain cases make a substitution † ; and ordain, that the inheritance should pass to another heir ; but that they could never make a fiduciary bequest ‡, that is, charge any one in terms of intreaty to restore an inheritance, or a part of an inheritance, to another.

When the father neither instituted his son his heir, nor disinherited him, the will was annulled ; but it was valid, though he did not disinherit his daughter, nor institute her his heiress. The reason is plain : when he neither instituted nor disinherited his son, he did an injury to his grandson, who might have succeeded *ab intestato* to his father ; but in neither instituting nor disinheriting his daughter, he did no injury to his daughter's children, who could not succeed *ab intestato* to their mother ||, because they were neither *sui hæredes*, nor *agnati*.

The laws of the ancient Romans concerning successions, being formed with the same spirit which dictated the division of lands, did not sufficiently restrain the riches of women ; by this means a door was left open to luxury, which is always inseparable from this sort of riches. Between the second and third punic war, they began to perceive the evil, and made the Voconian * law, but as they were induced to this by the most important considerations ; moreover, as but few monuments have reached us that take notice of this law, and as it has hitherto been spoken of in a most confused manner, I shall endeavour to clear it up.

Cicero

† Vulgar, pupillary, and exemplary.

‡ Augustus, for particular reasons, first began to authorize the fiduciary bequest, which in the Roman law was called *fidei commissum*. Instit. lib. ii. tit. 23. in præmio.

|| Ad liberos matris intestatæ hæreditas, L. 12. Tab. non pertinebat, quia fœminæ suos hæredes non habent. Ulpian Fragm. tit. 26. §. 7.

* It was proposed by Quintus Voconius, tribune of the people. See Cicero's second oration against Verres. In the Epitome of T. Livy, lib. xli. we should read Voconius, instead of Volumnius.

Cicero has preserved a fragment, which forbids the instituting a woman an § heiress, whether she was married or unmarried.

The epitome of Livy, where he speaks of this law, says ‡ no more : it appears from Cicero (a) and St. Augustine (b), that the daughter, though an only child, was comprehended in the prohibition.

Cato the elder (c) contributed all in his power to get this law passed. Aulus Gellius cites a fragment (d) of a speech, which he had made on this occasion. By preventing the succession of women, his intent was to take away the source of luxury ; as by undertaking the defence of the Oppian law, he intended to put a stop to luxury itself.

In the institutes of Justinian (e) and Theophilus (f), mention is made of a chapter of the Voconian law, which limits the power of bequeathing. In reading these authors, every body would imagine that this chapter was made to prevent the inheritance from being so exhausted by legacies, as to make it unworthy of the heir's acceptance. But this was not the spirit of the Voconian law. We have just seen, that they had in view the hindering women from inheriting an estate. The article of this law, which sets bounds to the power of bequeathing, entered into this view : for if people had been possessed of the liberty to bequeathe as much as they pleased, the women might have received as legacies, what they could not receive by succession.

The Voconian law was made to hinder the women from growing too wealthy ; for this end it was necessary to deprive

VOL. II.

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them

§ Sanxit ne quis hæredem virginem neve mulierem faceret. Cicero's second Oration against Verres.

‡ Legem tulit, ne quis hæredem mulierem institueret. Lib. 41.

(a) Second Oration against Verres.

(b) Of the city of God, lib. 3.

(c) Epitome of Livy, lib. 41.

(d) L. 17. chap. 6.

(e) Instit. lib. 3. tit. 22.

(f) Ibidem.

them of too large inheritances, and not of such as could not give rise to luxury. Thus we find in Cicero (g), that women were rendered incapable of succeeding to none but those who were rated high in the censor's books *.

The civil wars were the destruction of an infinite number of citizens. Under Augustus, Rome was almost deserted: it was necessary to repeople it. They made the Papian laws, which omitted nothing that could encourage (h) the citizens to marry, and procreate children. One of the principal means was to increase †, in favour of those who gave into the views of the law, the hopes of being heirs, and to diminish the hopes of those who refused; and as the Voconian law had rendered women incapable of succeeding, the Papian law, in certain cases, dispensed with this prohibition.

Women (i), especially those who had children, were rendered capable of receiving in virtue of the will of their husbands; they even might, when they had children, receive in virtue of the will of strangers. All this was in direct opposition to the regulations of the Voconian law: and yet it is remarkable, that the spirit of this law was not intirely abandoned. For example, the Papian law, which permitted a man who had one child ‡ to receive an entire inheritance by the will of a stranger, granted the same favour to the wife only when she had three children (k).

It

(g) Second Oration against Verres.

* Qui census esset, which Dio explains of him who had a hundred thousand, that is, of him who had the first census, as we may see in Livy, Lib. 1. and Dionysius Halicarnassens.

(h) See what has been said in Book xxiii. chap. 20.

† The same difference occurs in several regulations of the Papian law. See the fragment of Ulpian, §. 4. 5. & 6.

(i) See fragment of Ulpian, tit. 15. §. 16.

‡ Quod tibi filiulus, vel filia nascitur ex me
Jura Parentis habes, propter me scriberis hæres.

Juvenal, Sat. 9.

(k) See Law 6. C. Theod. de bonis proscriptorum. & Dio, lib. 1v. See the frag. of Ulpian, tit. last, §. 6. and tit. 29. §. 3.

It must be remarked, that the Papian law did not render the women who had three children capable of succeeding, except in virtue of the will of strangers; and that with respect to the succession of relations, it left the antient laws, and particularly the (l) Voconian, in all their force. But this did not long subsist.

Rome, corrupted by the riches of every nation, had changed her manners; the putting a stop to the luxury of women was no longer minded. Aulus Gellius, who lived under (m) Adrian, tells us, that in his time the Voconian law was almost abolished; it was buried under the opulence of the city. Thus we find in the sentences of Paulus (n), who lived under Niger, and in the fragments of Ulpian (o), who was in the time of Alexander Severus, that the sisters on the father's side might succeed, and that none but the relations of a more distant degree were in the case of those prohibited by the Voconian law.

We find (p) by the proceedings of Verres, that the prætors extended, or restrained the Voconian law at pleasure. The antient laws of Rome began to be thought severe. The prætors, moved by nothing but reasons of equity, moderation, and decorum, enervated all these laws. This is because the great advantages resulting from laws lie often closely concealed, while the little inconveniencies that attend them are most sensibly felt.

We have seen that by the antient laws of Rome mothers had no share in the inheritance of their children. The Voconian law afforded a new reason for their exclusion. But the Emperor Claudius gave the mother the succession of her children as a consolation for their loss. The Tertullian *Senatus-consultum*, made under Adrian *, gave it them when they had three children, if free women, or four, if they were freed women. It is

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evident

(l) Fragm. of Ulpian, tit. 16. §. 1. Sozomenus, lib. 1. chap. 6.

(m) Lib. 20. chap. 1.

(n) Lib. 4. tit. 8. §. 3.

(o) Tit. 26. §. 6.

(p) Cicero's second oration against Verres.

* That is the Emperor Pius, who changed his name to that of Adrian by adoption,

evident, that this decree of the senate was only an extension of the Papian law, which in the same case had granted to women the inheritances left them by strangers. At length Justinian (q) granted them the succession independently of the number of their children.

The same causes, which had debilitated the law that prevented the succession of women, subverted that by degrees which had limited the succession of the relations of the woman's side. These laws were extremely conformable to the spirit of a good republic, where they ought to have such an influence, as to prevent this sex from taking a pride in luxury, in riches, or in the hopes of obtaining riches. On the contrary, the luxury of a monarchy rendering marriage expensive and costly, it ought to be there encouraged, both by the riches which women may bestow, and by hope of the inheritances it is in their power to procure. Thus, when monarchy was established at Rome, the whole system of successions was changed. The prætors called in the relations of the woman's side in default of those of the male side, though, by the antient laws, the relations of the woman's side were never called. The Orphitian *Senatus-consultum* called children to the succession of their mother; and the Emperors Valentinian (r), Theodosius, and Arcadius, called the grand-children by the daughter to the succession of the grandfather. In short, the Emperor Justinian (s) left not the least vestige of the antient right of successions: he established three orders of heirs, the descendants, the ascendants, and the collaterals, without any distinction between the males and females, between the relations on the woman's side, and those on the male side, and abrogated all of this kind, which were still in force: he believed that he followed nature even in deviating from what he called the embarrassments of the ancient jurisprudence.

BOOK.

(q) Lib. 2. Cod. de jure liberorum. Instit. tit. 3. §. 4. de senatus-consult.

(r) Lib. 9. cod. de suis & legitimis hæredibus.

(s) L. 14. Cod. de suis & legitimis hæredibus, & Nov. 118. & 127.

BOOK XXVIII.

Of the Origin and Revolutions of the Civil Laws among the French.

*In nova fert animus mutatas dicere formas
Corpora—*

OVID. METAM.

CHAP. I.*Different Character of the Laws of the several People of Germany.*

AFTER the Franks had quitted their country, they made a complement of the Salic laws, with the assistance of * the sages of their own nation. The tribe of the Ripuarian Franks having joined itself under Clovis (a) to that of the Salians, preserved its own customs; and Theodoric (b) king of Austrasia ordered them to be reduced into writing. He collected likewise (c) the customs of those Bavarians and Germans who were dependant on his kingdom. For Germany having been weakened by the migration of such a multitude of people, the Franks, after conquering all before them, turned back their victorious arms, and extended their dominion into the forests of their

* See the prologue to the Salic law. Mr Leibnitz says, in his treatise of the origin of the Franks, that this law was made before the reign of Clovis: but it could not be before the Franks had quitted Germany, for they did not at that time understand the Latin tongue.

(a) See Gregory of Tours.

(b) See the prologue to the law of the Bavarians and that to the Salic law.

(c) Ibid.

their ancestors. Very likely the Thuringian Code † was given by the same Theodoric, since the Thuringians were also his subjects. As the Frisians were subdued by Charles Martel and Pepin, their ‡ law cannot be prior to those princes. Charlemagne, the first that reduced the Saxons, gave them the law still extant; and we need only read these two last codes, to be convinced they came from the hands of conquerors. As soon as the Visigoths, the Burgundians, and the Lombards, had founded their respective kingdoms, they reduced their laws into writing, not with an intent of obliging the vanquished nations to conform to their customs, but with a design of following them themselves.

There is an admirable simplicity in the Salic and Ripuarian laws, as well as in those of the Allemans, Bavarians, Thuringians and Frisians. They breathe an original rudeness, and a spirit which no change or corruption of manners had weakened. They received but very few alterations, because all those people, except the Franks, remained in Germany. Even the Franks themselves laid there the foundation of a great part of the empire; so that they had none but German laws. The same cannot be said of the laws of the Visigoths, of the Lombards and Burgundians; their character altered considerably from the great change which happened in the character of those people, who had settled in their new habitations.

The kingdom of the Burgundians did not last long enough to admit of great changes in the laws of the conquering nation. Gundebald and Sigismond, who collected their customs, were almost the last of their kings. The laws of the Lombards received additions rather than changes. The laws of Rotharis were followed by those of Grimoaldus, Luitprandus, Rachis, and Astulphus: but did not assume a new form. It was not
so

† Lex Angliorum Werinorum, hoc est Thuringorum.

‡ They did not know how to write.

so with the laws of the Visigoths * ; their kings new-moulded them, and had them also new-moulded by the clergy.

The kings indeed of the first race struck out of (a) the Salic and Ripuarian laws, whatever was absolutely inconsistent with Christianity : but left the main part untouched. This cannot be said of the laws of the Visigoths.

The laws of the Burgundians, and especially those of the Visigoths, admitted of corporal punishments : These were not tolerated † by the Salic and Ripuarian laws ; they preserved their character much better.

The Burgundians and Visigoths, whose provinces were greatly exposed, endeavoured to conciliate the affections of the ancient inhabitants, and to give them the most impartial civil laws (a) ; but as the kings of the Franks had established their power, they had no such (b) considerations.

The Saxons, who lived under the dominion of the Franks, were of an intractable temper, and prone to revolt. Hence we find in their (c) laws the severities of a conqueror, which are not to be met with in the other codes of the laws of the Barbarians.

We see the spirit of the German laws in the pecuniary punishments, and the spirit of a conqueror in those of an afflictive nature.

The crimes they commit in their own country are subject to corporal punishment ; and the spirit of the German laws is followed only in the punishment of crimes committed beyond the extent of their own territory.

They

* They were made by Euric, and amended by Leovigildus. See Isidorus's chronicle. Chaintaufuinthus and Recessuinthus reformed them. Egigas ordered the code new extant to be made, and commissioned bishops for that purpose ; nevertheless, the laws of Chaintaufuinthus and Recessuinthus were preserved, as appears by the sixth council of Toledo.

(a) See the prologue to the law of the Bavarians.

† We find a few only in Childebert's decree.

(a) See the prologue to the code of the Burgundians, and the code itself, especially the 12th tit. §. 5. and tit. 38. See also Gregory of Tours, book 2. chap. 33. and the code of the Visigoths.

(b) See afterwards, chap. 3.

(c) See c. 2, § 8. and 9. & c. 4. § 2. & 7.

They are plainly told, that their crimes shall meet with no mercy, and they are refused even the asylum of churches.

The bishops had an immense authority at the court of the Visigoth kings, the most important affairs being debated in councils. All the maxims, principles, and views of the present inquisition, are owing to the code of the Visigoths; and the monks have only copied against the Jews the laws formerly enacted by bishops.

In other respects, the laws of Gundebald for the Burgundians seem pretty judicious; and those of Rotharis, and of the other Lombard princes, are still more so. But the laws of the Visigoths, those, for instance, of Reccesuinthus, Chindasuinthus, and Egigas, are puerile, ridiculous, and foolish; they attain not their end; they are stuffed with rhetoric, and void of sense, frivolous in the substance, and bombastic in the style.

CHAP. II.

That the Laws of the Barbarians were all Personal.

IT is a distinguishing character of the laws of the barbarians, that they were not confined to a certain district; the Frank was tried by the law of the Franks, the Alleman by the law of Allemans, the Burgundian by that of the Burgundians, the Roman by the Roman law; nay, so far were the conquerors in those days from reducing their laws to an uniform system or body, that they did not even think of becoming legislators to the people they had conquered.

The original of this I find in the manners of the German people. These nations were parted asunder by marshes, lakes, and forests; and Cæsar (a) observes, they were fond of such separations. Their dread of the Romans brought about their reunion; and yet each individual amongst these mixt people was still

(a) De bello Gallico, lib. vi.

still to be tried by the established customs of his own nation. Each people apart was free and independent, and when they came to be intermixt, the independency still continued; the country was common, and the government peculiar; the territory the same, and the nations different. The spirit of personal laws prevailed, therefore, among these people before ever they set out from their own homes, and they carried it with them into their conquests.

We find this custom established in the formulas of Marculfus (b), in the codes of the laws of the barbarians, but chiefly in the law of the Ripuarians (c), and in the decrees of the kings of the first race (d), from whence the capitularies made on that subject in the second (e) race were derived. The children (f) followed the law of their father, the wife (g) that of the husband, the widow (h) came back to her own original law, and the freedman (i) was under that of his patron. Besides, every man could make choice of what laws he pleased; but the constitution of (k) Lotharius I. required this choice should be made public.

CHAP. III.

Capital Difference between the Salic Laws, and those of the Visigoths and Burgundians.

WE have already observed, that the laws of the Burgundians and Visigoths were impartial; not so the Salic law, for it established between the Franks and Romans the most mortifying

VOL. II.

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(b) Lib. 1. formul. 8.

(c) Chap. 31.

(d) That of Clotarius in the year 560, in the edition of the Capitularies of Balusius, T. 1. art. 4. ib. in fine.

(e) Capitul. added to the law of the Lombards, lib. 1. tit. 25. cap. 71. lib. 2. tit. 41. cap. 7. & tit. lvi. cap. 1. & 2.

(f) Ibid, lib. 2. tit. 5.

(g) Ibid, lib. 2. tit. 5.

(h) Ibid. c. ii.

(i) Ibid, lib. ii. tit. 35. c. ii.

(k) In the law of the Lombards, lib. ii. tit. 57.

ing distinctions. When a Frank, a Barbarian, or one living under the Salic law happened to be killed, a composition of 200 fols was to be paid to his relations (e); only 100 upon the killing of a Roman possessor *, and no more than 45 for a Roman tributary. The composition for the murder of one of the king's vassals, if a Frank †, was 600 fols; if a Roman, though the king's guest ‡, only 300 ‡. The Salic law made therefore a cruel distinction between the Frank and Roman lord, and the Frank and Roman commoner.

Farther, if a number of people were got together to assault a Frank in his house (f), and he happened to be killed, the Salic law ordained a composition of 600 fols; but if a Roman or a freedman †† was assaulted, only half that composition. By the same law (g), if a Roman put a Frank in irons, he was liable to a composition of 30 fols; but if a Frank had thus used a Roman, he paid only 15. A Frank stript by a Roman was entitled to a composition of 62½ fols, and a Roman stript by a Frank, received only 30. Such unequal treatment must needs have been very grievous to a Roman.

And yet a celebrated author (c) forms a system of *the establishment of the Franks in Gaul*, on a supposition that they were the best friends of the Romans. The Franks, then, the best friends of the Romans, they who did, and they who suffered || from the

(e) Salic law, tit. 34. § 1.

* Qui res in pago ubi remanet proprias habet. Salic law, tit. 44. § 15. See also § 7.

† Ibid, tit. 41. § 4.

‡ Si Romanus homo conviva regis fuerit. Ibid, § 6.

‡ The principal Romans followed the court, as may be seen by the lives of several bishops, who were there educated; there were hardly any but Romans that knew how to write.

(f) Ibid. tit. 45.

†† Lidus, whose condition was better than that of a bondman. Law of the Allemans, chap. 95.

(g) Tit. 35. §. 3. & 4.

(c) The Abbe du Bos.

|| Witness the expedition of Arbogastes in Gregory of Tours, Hist. lib. ii.

the Romans such an infinite deal of mischief! The Franks, the friends of the Romans, they who after subduing them by their arms oppressed them in cold blood by their laws! They were exactly the friends of the Romans, as the Tartars who conquered China were the friends of the Chinese.

If some Catholic bishops thought fit to make use of the Franks in destroying the Arian kings, does it follow, that they had a desire of living under those barbarous people? And can we from hence conclude, that the Franks had any particular regard for the Romans? I should draw quite different consequences: the less the Franks had to fear from the Romans, the less indulgence they had for them.

The Abbe du Bos has consulted but indifferent authorities for his history, such as poets and orators: works of parade and ostentation are improper foundations for building systems.

CHAP. IV.

In what manner the Roman Law came to be lost in the Country subject to the Franks, and preserved in that subject to the Goths and Burgundians.

WHAT has been above said will throw some light upon other things, which have hitherto been involved in great obscurity.

The country at this day called France was, under the first race, governed by the Roman law, or the Theodosian code, and the different laws of the Barbarians*, who settled in those parts.

In the country subject to the Franks, the Salic law was established for the Franks, and the † Theodosian code for the Romans.

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* The Franks, the Visigoths, and the Burgundians.

† It was finished in 438.

In that subject to the Visigoths, a compilement of the Theodosian code, made by order of Alaric §, regulated disputes among the Romans; the national customs which Euric § caused to be reduced into writing, determined those among the Visigoths. But how comes it, some will say, that the Salic laws gained almost a general authority in the country of the Franks, and the Roman law gradually declined; whilst in the jurisdiction of the Visigoths, the Roman law spread itself, and obtained at last a general sway?

My answer is, that the Roman law came to be disused among the Franks, because of the great advantages accruing from being a Frank, a Barbarian ‡, or a person living under the Salic law; every one in that case readily quitting the Roman to live under the Salic law. The †† clergy alone retained it, as a change would be of no advantage to them. The difference of conditions and ranks consisted only in the largeness of the compositions, as I shall shew in another place. Now ** particular laws allowed the clergy as favourable compositions as those of the Franks; for which reason they retained the Roman law. This law brought no hardships upon them; and in other respects it was properest for them, as it was the work of Christian emperors.

On the other hand, in the patrimony of the Visigoths, as the Visigoth law (a) gave no civil advantages to the Visigoths over the

§ The 20th year of the reign of this prince, and published two years after by Anian, as appears by the Preface to that code.

§ The year 504 of the Spanish æra, the Chronicle of Isidorus.

‡ Francum, aut Barbarum, aut hominem qui Salica lege vivit. Salic law, tit. 44 §. 1.

†† According to the Roman law under which the church lives, as is said in the law of the Ripuarians, tit. 58. §. 1. See also the numberless authorities on this head produced by Du Cange, under the word Lex Romana.

** See the Capitularies added to the Salic law in Lindembrock, at the end of that law, and the different codes of the laws of the Barbarians, concerning the privileges of ecclesiastics in this respect. See also the letter of Charlemagne to his son Pepin king of Italy, in the year 807. in the edition of Baluzius, tom. 1. pag 462, where it is said, that an ecclesiastic should receive a triple composition; and the Collection of the Capitularies, lib. 5. art. 302. tom. 1. Edition of Baluzius.

(a) See that law.

the Romans, the latter had no reason to discontinue living under their own law, in order to live under another. They retained therefore their own laws, without adopting those of the Visigoths.

This is still farther confirmed, in proportion as we proceed. The law of Gundebald was extremely impartial, not favouring the Burgundians more than the Romans. It appears by the preamble to that law, that it was made for the Burgundians, and to regulate the disputes which might arise between them and the Romans; and in this last case the judges were equally divided of a side. This was necessary for particular reasons, drawn from the political regulations of those times*. The Roman law was continued in Burgundy, in order to regulate the disputes of Romans among themselves. The latter had no inducement to quit their own law, as in the country of the Franks; and the rather as the Salic law was not established in Burgundy, as appears by the famous letter which Agobard wrote to Lewis the Pious.

Agobard (b) desired that prince to establish the Salic law in Burgundy; consequently it had not been established there at that time. Thus the Roman law did, and still does subsist in so many provinces, which formerly depended on this kingdom.

The Roman and Gothic laws continued likewise in the country of the establishment of the Goths, where the Salic law was never received. When Pepin and Charles Martel expelled the Saracens, the towns and provinces, which submitted to these princes †, petitioned for a continuance of their own laws, and obtained it: this, in spite of the usages of those times when all laws were personal, soon made the Roman law to be considered as a real and territorial law in those countries.

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* Of this I shall speak in another place. B. 30. chap. 6. 7. 8. and 9.

(b) Agob. opera.

† Catel. Hist. of Languedoc, produces to the purpose a chronicle of the year 759. Franci Narbonam obsident, datoque sacramento Gothi, ut si civitatem traderent partibus Pipini, permetterent eos legem suam habere: Quo facto, Gothi Saracenos occiderunt, et civitatem partibus Pipini reddiderunt.

This appears by the edict of Charles the Bald, given at Pistes in the year 864, which * distinguishes the countries where causes were decided by the Roman law, from where it was otherwise.

The edict of Pistes shews two things; one that there were countries where causes were decided by the Roman law, and others where they were not; and the other, that those countries where the Roman law obtained, were precisely (c) the same where it is still followed at this very day, as appears by the same edict. Thus the distinction of the provinces of France, under custom, and those under written law, was already established at the time of the edict of Pistes.

I have observed, that in the beginning of the monarchy, all laws were personal: and thus, when the edict of Pistes distinguishes the countries of the Roman law from those which were not, the meaning is, that in countries which were not of the Roman law, such a multitude of people had chosen to live under some or other of the laws of the Barbarians, that there were scarce any who would live under the Roman law; and that in the countries of the Roman law there were few who would chuse to live under the laws of the Barbarians.

I am not ignorant, that what is here advanced will be reckoned new; but if the things I assert be true, surely they are very ancient. After all, what great matter is it, whether they come from me, from the Valefius's, or from the Bignons?

The law of Gundebald subsisted a long time among the Burgundians, in conjunction with the Roman law; it was still in use under Lewis the Pious, as Agobard's letter plainly evinces. In like manner, though the edict of Pistes calls the country occupied by the Visigoths the country of the Roman law, yet the law of the Visigoths was always in force there; as appears by

* In illa terra in qua judicia secundum legem Romanam terminantur, secundum ipsam legem judicetur; et in illa terra in qua, &c. Art. 16. See also Art. 20.

(c) See Art. 12. & 16. of the edict of Pistes in Cavilono, in Narbona, &c.

By the synod of Troyes, held under Lewis the Stammerer, in the year 878, that is fourteen years after the edict of Pistes.

In process of time the Gothic and Burgundian laws fell into disuse in their own country; which was owing to those general causes that every where dispelled the personal laws of the Barbarians.

CHAP. V.

How the Roman Law kept its ground in the Demefne of the Lombards.

EVERY thing gives way now to my principles. The law of the Lombards was impartial, and the Romans were under no temptation to quit their own for it. The motive that prevailed with the Romans under the Franks to make choice of the Salic law, did not take place in Italy; hence the Roman law maintained itself there together with that of the Lombards.

It even fell out, that the latter gave way to the Roman law, and ceased to be the law of the ruling nation; and though it continued to be that of the principal nobility, yet the greatest part of the cities formed themselves into republics, and the nobility mouldered away of themselves, or were destroyed*. The citizens of the new republics had no inclination to adopt a law which established the custom of judiciary combats, and whose institutions retained much of the customs and usages of chivalry. As the clergy of those days, a clergy even then so powerful in Italy, lived almost all under the Roman law, the number of those, who followed the law of the Lombards, must have daily diminished.

Besides, the law of the Lombards had not that majesty of the Roman law, which revived to Italy the idea of her universal dominion;

* See what Machiavel says of the ruin of the ancient nobility of Florence.

dominion ; neither had it that extent. The law of the Lombards and the Roman law could be then of no other use than to furnish out statutes for those cities that were erected into republics. Now, which could better furnish them, the law of the Lombards, that determined on some particular cases, or the Roman law which embraced them all ?

CHAP. VI.

How the Roman Law came to be lost in Spain.

THINGS happened otherwise in Spain. The law of the Visigoths prevailed, and the Roman law was lost. Chindasuinthus † and Recesuinthus ‖ proscribed the Roman laws, and even forbade citing them in their courts of judicature. Recesuinthus was likewise author * of the law which took off the prohibition of marriages between the Goths and Romans. It is evident, that these two laws had the same spirit : this king wanted to remove the principal causes of separation, which subsisted between the Goths and the Romans. Now it was thought, that nothing made a wider separation than the prohibition of inter-marriages, and the liberty of living under different laws.

But though the kings of the Visigoths had proscribed the Roman law, it still subsisted in the demesnes they possessed in South Gaul. These countries being distant from the center of the monarchy, lived in a state of great independence. We see from the history of Vamba, who ascended the throne in 672, that the natives of the country were become the prevailing party.

† He began to reign in the year 642.

‖ We will no longer be harrassed, either by foreign or by the Roman laws. Law of the Visigoths, lib. ii. tit. 1. §. 9. and 10.

* Ut tam Gotho Romanam, quam Romano Gotham matrimonio liceat sociari. Law of the Visigoths, lib. iii. tit. 1. chap. 1.

party †. Hence the Roman law had greater authority, and the Gothic less. The Spanish laws neither suited their manners, nor their actual situation; it was possible too that the people adhered obstinately to the Roman law, because they had annexed to it the idea of liberty. Besides, the laws of Chindasuinthus, and of Recesuinthus, contained most severe regulations against the Jews: but these Jews had a vast deal of power in South Gaul. The author of the history of King Vamba, calls these provinces the brothel of the Jews. When the Saracens invaded these provinces, it was by invitation: and who could have given it but the Jews or the Romans? The Goths were the first that were oppressed, because they were the ruling nation. We see in Procopius * that during their calamities they withdrew out of Narbonne Gaul into Spain. Doubtless under this misfortune they took refuge in these provinces of Spain which still held out; and the number of those, who in South Gaul lived under the law of the Visigoths, was thereby greatly diminished.

CHAP. VII.

A False Capitulary.

DID not that wretched compiler, Benedictus Levita, attempt to transform this Visigoth establishment, which prohibited the use of the Roman law, into a capitulary (a), ascribed since to Charlemagne? He made of this particular law a general one, as if he intended to exterminate the Roman law throughout the universe.

VOL. II.

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CHAP.

† The revolt of these provinces was a general defection, as appears by the judgment which is in the sequel of the history. Paulus and his adherents were Romans; they were even favoured by the bishops; Vamba dared not put to death the seditions whom he had conquered. The author of the history calls Narbonne Gaul the nursery of treachery.

* Gothi, qui cladi superfueraut, ex Gallia cum uxoribus liberisque egressi, in Hispaniam ad Teudim jam palam tyrannum se receperunt. De bello Gothorum, lib. 1. cap. 13.

(a) Capitularies, lib. vi. cap. 269, of the year 1613, edition of Baluzius, page 1021.

CHAP. VIII.

In what manner the Codes of Barbarian Laws, and the Capitularies came to be lost.

THE Salic, the Ripuarian, Burgundian, and Visigoth laws, came by degrees to be disused among the French in the following manner :

As fiefs were become hereditary, and arriere-fiefs extended, many usages were introduced, to which these laws were no longer applicable. Their spirit indeed was preserved, which was to regulate most disputes by fines. But as the value of money was, doubtless, subject to change, the fines were also changed ; and we see several charters *, where the lords fixed the fines that were payable in their petty courts. Thus the spirit of the law was followed, without following the law itself.

Besides, as France was divided into a number of petty lordships, which acknowledged rather a feudal than a political dependence, it was very difficult for only one law to be authorised. In fact, it would be impossible to see it observed. The custom no longer prevailed of sending extraordinary † officers into the provinces, to inspect into the administration of justice and political affairs ; it appears even by the charters, that when new fiefs were established, our kings divested themselves of the right of sending those officers. Thus, when almost every thing was become a fief, these officers could no longer be employed ; there was no longer a common law, because no one could enforce the observance of it.

The Salic, Burgundian, and Visigoth laws, were therefore extremely neglected at the end of the second race, and at the beginning of the third they were scarce ever mentioned.

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* M. de la Thaumassier has collected many of them. See, for instance, chap. 61. 66. and others.

† Missi Dominici.

Under the first and second race, the nation was often assembled; that is, the lords and bishops; the commons were not yet thought on. In these assemblies attempts were made to regulate the clergy, a body which formed itself, if I may so speak, under the conquerors, and established its prerogatives. The laws made in these assemblies are what we call the capitularies. Hence four things ensued; the laws of fiefs were established, and a great part of the church revenues was administered by the laws of fiefs; the clergy made a wider separation, and neglected * those laws of reformation, where they themselves were not the only reformers; a collection † was made of the canons of councils and of the decretals of Popes; and these laws the clergy received as coming from a purer source. Ever since the erection of the grand fiefs, our kings, as we have already observed, had no longer any deputies in the provinces to enforce the observance of their laws: and hence it is, that under the third race we find no more mention made of capitularies.

Several capitularies were added to the law of the Lombards, as well as to the Salic and Bavarian laws. The reason of this has been a matter of enquiry; but it must be sought for in the thing itself. There were several sorts of capitularies. Some had relation to political government, others to oeconomic, most of them to ecclesiastical polity, and some few to civil government. Those of the last species were added to the civil law, that is, to the personal laws of each nation; for which reason it is said in the capitularies, that there is nothing stipu-

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* Let not the bishops, says Charles the Bald, in the capitulary of 844. art. 8. under pretence of the authority of making canons, oppose this constitution, or neglect the observance of it. It seems he already foresaw the fall thereof.

† In the collection of canons, a vast number of the decretals of popes were inserted; there were very few in the ancient collection. Dionysius Exiguus put a great many into his; but that of Isidorus Mercator was stuffed with genuine and spurious decretals. The old collection was in use in France till Charlemagne. This prince received from the hands of Pope Adrian I. the collection of Dionysius Exiguus, and caused it to be accepted. The collection of Isidorus Mercator appeared in France about the reign of Charlemagne; people grew passionately fond of it: to this succeeded what we now call the course of canon law.

lated (a) therein contrary to the Roman law. In effect, those capitularies regarding æconomical, ecclesiastical, or political government, had no relation to that law; and those concerning civil government had reference only to the laws of the barbarous people, which were explained, amended, enlarged or abridged. But the adding of these capitularies to the personal laws, occasioned, I imagine, the neglect of the very body of the capitularies themselves: in times of ignorance, the abridgment of a work often causes the loss of the work itself.

CHAP. IX.

Other causes of the disuse of the Codes of Barbarian Laws, as well as of the Roman Law and of the Capitularies.

WHEN the German nations subdued the Roman empire, they learned the use of writing; and, in imitation of the Romans, they wrote down their own usages*, and digested them into codes. The unhappy reigns which followed that of Charlemagne, the invasions of the Normans, and the civil wars, plunged the conquering nations again into the darkness out of which they had emerged: reading and writing were quite neglected. Hence it is, that in France and Germany the written laws of the Barbarians as well as the Roman law, and the capitularies, fell into oblivion. The use of writing was better preserved in Italy, where reigned the Popes and the Greek Emperors, where there were flourishing cities, and almost the only commerce that was carried on in those days. To this neighbourhood of Italy it was owing that the Roman law was better

(a) See the edict of Pistes, art. 20.

* This is expressly set down in some preambles to these codes: we even find in the laws of the Saxons and Frisians different regulations, according to the different districts. To these usages were added some particular regulations, according to the exigency of circumstances; such were the severe laws against the Saxons.

Better preserved in the provinces of Gaul, formerly subject to the Goths and the Burgundians ; and so much the more, as this law was there a territorial law, and a kind of privilege. It is probable that the disuse of the Visigoth laws in Spain proceeded from the want of writing ; and by the fall of so many laws, customs were every where established.

Personal laws fell to the ground. Compositions, and what they called *Freda* *, were regulated more by custom than by the text of these laws. Thus, as in the establishment of the monarchy, they had passed from German customs to written laws ; some ages after, they came back from written laws to unwritten customs.

CHAP. X.

Of local Customs. Revolution of the Laws of Barbarous Nations, as well as of the Roman Law.

BY several monuments it appears that there were local customs, as early as the first and second race. We find mention made of the *custom of the place* (a), of the *ancient usage* (b), of the *custom* (c), of the *laws* (d), and of the *customs*. It has been the opinion of some authors, that what went by the name of customs were the laws of the barbarous nations, and what had the appellation of law was the Roman law. This cannot possibly be. King Pepin (e) ordained, that wherever there should happen to be no law, custom should be complied with ; but that it should never be preferred to the law. Now, to pretend that the Roman law was preferred to the codes of the laws of the Barbarians, is subverting all monuments of antiquity, and

* Of this I shall speak elsewhere.

(a) Preface to Marculfus's Formulae.

(b) Law of the Lombards, book ii. tit. 58. § 3.

(c) Law of the Lombards, book ii. tit. 41. § 6.

(d) Life of S. Leger.

(e) Law of the Lombards, book ii. tit. 41. § 6.

and especially those codes of barbarian laws that constantly affirm the contrary.

So far were the laws of the barbarous nations from being those customs, that it was these very laws, as personal institutions, that introduced them. The Salic law, for instance, was a personal law; but generally, or almost generally, in places inhabited by the Salian Franks, this Salic law, how personal soever, became in respect to those Salian Franks a territorial law, and was personal only in regard to those Franks that lived elsewhere. Now, if several Burgundians, Allemans, or even Romans, should have happened to have frequent disputes, in a place where the Salic law was territorial, they must have been determined by the laws of those people; and a great number of determinations agreeable to some of those laws must have introduced new customs into the country. This explains extremely well the constitution of Pepin. It was natural that those customs should affect even the Franks, who lived on the spot, in cases not decided by the Salic law; but it was not natural, that they should prevail over the Salic law itself.

Thus there were in each place an established law, and received customs, which served as a supplement to that law when they did not contradict it.

They might even happen to supply a law that was no way territorial; and to continue the same example, if a Burgundian was judged by the law of his own nation, in a place where the Salic law was territorial, and the case happened not to be explicitly mentioned in the very text of this law, there is no manner of doubt but judgment would have been passed upon him according to the custom of the place.

In the reign of King Pepin, the customs then established had not the same force as the laws; but it was not long before the laws gave way to the customs. And as new regulations are general remedies that imply a present evil, it may well be imagined that as early as Pepin's time, they began to prefer the customs to the established laws.

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What has been said sufficiently explains the manner in which the Roman law began so very early to become territorial, as may be seen in the edict of Pistes; and how the Gothic law continued still in force, as appears by the synod of Troyes (a) above-mentioned. The Roman was become the general personal law, and the Gothic the particular personal law; consequently the Roman law was territorial. But how came it, some will ask, that the personal laws of the Barbarians fell every where into disuse, while the Roman was continued as a territorial law in the Visigoth and Burgundian provinces? I answer, that even the Roman law had very near the same fate as the other personal laws: otherwise we should still have the Theodosian code in those provinces where the Roman law was territorial, whereas we have the laws of Justinian. Those provinces retained scarce any thing more than the name of the country under the Roman or written law, than the natural affection which people have for their laws, especially when they consider them as privileges, and a few regulations of the Roman law which were not yet forgotten. This was however sufficient to produce such an effect, that when Justinian's complement appeared, it was received in the provinces of the Gothic and Burgundian demesne as a written law; whereas it was received only as written reason in the ancient demesne of the Franks.

CHAP. XI.

Difference between the Salic Law or that of the Salian Franks, and that of the Ripuarian Franks and other barbarous Nations.

THE Salic law did not allow of the custom of negative proofs; that is, if a person brought a demand or charge against another, he was obliged by the Salic law to prove it, and it was not sufficient for the accused to deny it; which is agreeable to the laws of almost all the nations in the universe.

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(a) See chap. 5.

The law of the Ripuarian Franks had quite a different spirit *; it was contented with negative proofs, and the person against whom a demand or accusation was brought, might clear himself in most cases, by swearing, in conjunction with a certain number of witnesses, that he had not committed the crime laid to his charge. The number (a) of witnesses who were obliged to swear, increased in proportion to the importance of the affair; sometimes it mounted to (b) seventy-two. The laws of the Allemans, Bavarians, Thuringians, Frisians, Saxons, Lombards, and Burgundians, were formed on the same plan as those of the Ripuarians.

I observed that the Salic law did not allow of negative proofs. There was one * case, however, in which they were allowed; but even then they were not admitted alone, and without the concurrence of positive proofs. The plaintiff (c) caused witnesses to be heard, in order to ground his action; the defendant produced also witnesses on his side; and the judge was to come at the truth by comparing these testimonies. This practice † was vastly different from that of the Ripuarian, and other barbarous laws, where it was customary for the party accused, to clear himself by swearing he was not guilty, and by making his relations also swear that he told the truth. These laws could be suitable only to a people remarkable for their natural simplicity and candour; we shall see presently that the legislators were obliged to take proper methods to prevent their being abused.

CHAP.

* This relates to what Tacitus says, that the Germans had common customs, and particular customs.

(a) Law of the Ripuarians, tit. 6. 7. 8. and others.

(b) Ibid. tit. 11. 12. and 17.

* It was when an accusation was brought against an Antrustio, that is, the king's vassal, who was supposed to be possessed of a greater degree of liberty. See tit. 76. of the *Pactus legis Salicæ*.

(c) See the 76th title of the *Pactus legis Salicæ*.

† According to the practice now followed in England,

CHAP. XII.

Another Difference.

THE Salic law did not admit of the trial by combat, tho' it had been received by the laws of the Ripuarians (b) and of almost all of (c) the barbarous nations. To me it seems, that the law of combat was a natural consequence, and a remedy of the law which established negative proofs. When an action was brought, and it appeared that the defendant was going to elude it unjustly by an oath, what other remedy was left to a warlike man †, who saw himself upon the point of being confounded, than to demand satisfaction for the wrong done to him; and even for the attempt of perjury? The Salic law, which did not allow of the custom of negative proofs, neither allowed nor had any need of the trial by combat; but the laws of the Ripuarians (d) and of the other barbarous nations *, who allowed the practice of negative proofs, were obliged to establish the trial by combat.

Whosoever will please to examine the two famous regulations of † Gundebald king of Burgundy concerning this subject, will find they are derived from the very nature of the thing. It was necessary, according to the language of the Barbarian laws, to rescue the oath out of the hands of a person who was going to abuse it.

VOL. II.

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(b) Tit. 32. tit. 57. §. 2. tit. 59. §. 4.

(c) See the note †.

† This spirit appears in the law of the Ripuarians, tit. 67. §. 5. and in the Capitulary of Lewis the Pious, added to the law of the Ripuarians in the year 805. art. 22.

(d) See that law.

* The law of the Frisians, Lombards, Bavarians, Saxons, Thuringians and Burgundians.

† In the law of the Burgundians, tit. 8. §. 1. & 2. on criminal affairs; and tit. 45. which extends also to civil affairs. See also the law of the Thuringians, tit. 1. §. 31. tit. 7. §. 6. and tit. 8; and the law of the Allemans, tit. 89; the law of the Bavarians, tit. 8. chap. 2. §. 9. and chap. 3. §. 1. and tit. 9. chap. 4. §. 4. the law of the Frisians, tit. 11. §. 3. and tit. 14. §. 4. the Law of the Lombards, book 1. tit. 32. §. 3. and tit. 35. §. 1. and book 2. tit. 35. §. 2.

Among the Lombards, the law of Rotharis admitted of cases, in which a man who had made his defence by oath, should not be suffered to undergo the fatigue of a duel. This custom spread itself further: we shall see (e) presently the mischiefs that arose from it, and how they were obliged to return to the ancient practice.

CHAP. XIII.

A Reflection.

I DO not pretend to deny, but that in the changes made in the code of the barbarian laws, in the regulations added to that code, and in the body of the capitularies, it is possible to find some text, where in fact the trial by combat is not a consequence of the negative proof. Particular circumstances might in the course of many ages give rise to particular laws. I speak only of the general spirit of the laws of the Germans, of their nature and origin; I speak of the ancient customs of those people, that were either hinted at, or established by those laws; and this is the only matter in question.

CHAP. XIV.

Of the Ordeal or Trial by boiling water, established by the Salic Law.

THE Salic law * allowed of the ordeal or trial by boiling water; and as this trial was excessively cruel, the law (f) found an expedient to soften its rigour. It permitted the person who had been summoned to make the trial with boiling water, to ransom his hand, with the consent of the adverse party.

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(e) See chap. 16. towards the end.

* As also some other laws of the Barbarians.

(f) Tit. 56.

The accuser, for a particular sum determined by the law, might be satisfied with the oath of a few witnesses, declaring that the accused had not committed the crime. This was a particular case in which the Salic law admitted of the negative proof.

This trial was a thing privately agreed upon, which the law permitted only, but did not ordain. The law gave a particular indemnity to the accuser, who would allow the accused to make his defence by a negative proof: the plaintiff was at liberty to be satisfied with the oath of the defendant, as he was at liberty to forgive him the injury.

The law (b) contrived a medium, that before sentence passed, both parties, the one through fear of a terrible trial, the other for the sake of a small indemnity, should terminate their disputes, and put an end to their animosities. It is plain, that when once this negative proof was over, nothing more was requisite: and therefore that the practice of legal duels could not be a consequence of this particular regulation of the Salic law.

CHAP. XV.

Particular Notions of our Ancestors.

IT is astonishing that our ancestors should rest the honour, fortune, and life of the subject, on things that depend less on reason than on hazard; and that they should incessantly make use of proofs incapable of conviction, and that had no manner of connection either with innocence or guilt.

The Germans who had never been subdued *, enjoyed an excessive independence. Different families waged war † with

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each

(b) Ibid. Tit. 56.

* This appears by what Tacitus says, *Omnibus idem habitus*.

† Velleius Paterculus, lib. 2. cap. 118. says that the Germans decided all their disputes by the sword.

each other, to obtain satisfaction for murders, robberies, or affronts. This custom was moderated by subjecting these hostilities to rules; it was ordained that they should be no longer committed but by the direction and under the † eye of the magistrate. This was far preferable to a general licence of annoying each other.

As the Turks in their civil wars look upon the first victory as a decision of heaven in favour of the victor; so the inhabitants of Germany in their private quarrels considered the event of a combat as a decree of Providence, ever attentive to punish the criminal or the usurper.

Tacitus informs us, that when one German nation intended to declare war against another, they endeavoured to take some person prisoner, whom they obliged to fight with one of their people, and by the event of this combat they judged of the success of the war. A nation who believed that public quarrels could be regulated by a single combat, might very well think that it was proper also for deciding the disputes of individuals.

Gundebald (a) king of Burgundy was the prince who gave the greatest sanction to the custom of legal duels. The reason he gives for his sanguinary law, is mentioned in his edict. "It is," says he, "in order to prevent our subjects from attesting by oath what they are not certain of, nay, what they know to be false." Thus while the clergy (b) declared that an impious law which permitted combats; the Burgundian kings looked upon that as a sacrilegious law which authorised the taking of an oath.

The trial by combat had some reason for it founded on experience. In a military nation, cowardice supposes other vices; it is as an argument of a person's having resisted the principles of his education, of his being insensible of honour, and of having

† See the codes of Barbarian laws, and in respect to less ancient times, Beaumanoir on the custom of Beauvoisis.

(a) Law of the Burgundians, chap. 45.

(b) See the works of Agobard.

ing refused to be directed by those maxims which govern other men : It shews, that he neither fears their contempt, nor sets any value upon their esteem. Men of any tolerable extraction seldom want either the dexterity requisite to accompany strength, or the strength necessary to concur with courage ; because as they set a value upon honour, they are practised of course in things without which this honour cannot be obtained. Besides, in a military nation, where strength, courage, and prowess, are esteemed, crimes really odious are those which arise from imposture, finesse, and cunning, that is, from cowardice.

With regard to the trial by fire, after the party accused had put his hand on a hot iron, or in boiling water, they wrapt the hand in a bag and sealed it up ; if after three days there appeared no mark, he was acquitted. Is it not plain, that amongst a people inured to the handling of arms, the impression made on a rough or callous skin by the hot iron, or by boiling water, could not be so great as to be seen three days afterwards ? And if there appeared any mark, it shewed that the person who had undergone the trial was an effeminate fellow. Our peasants handle hot iron with their callous hands as much as they please ; and, with regard to the women, the hands of those who worked hard, might be very well able to resist hot iron. The ladies * did not want champions to defend their cause ; and in a nation where there was no luxury, there was no middle state.

By the law of the (a) Thuringians, a woman accused of adultery was condemned to the trial by boiling water, only when there was no champion to defend her ; and the law of the Ripuarians admits of this trial, only when a person had no witnesses to appear in his justification. Now a woman, that could not prevail upon any one relation to defend her cause, or a man that could not produce one single witness to attest his honesty, were from those very circumstances sufficiently convicted.

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* See Beaumanoir's custom of Beauvoisis, chap. xlv. See also the law of the Angli, cap. 14. where the trial by boiling water is only a subsidiary proof.

(a) Tit. 14.

I conclude therefore, that under the circumstances of time in which the trial by combat and the trial by hot iron and boiling water obtained, there was such an agreement between those laws and the manners of the people, that the laws were not so productive of injustice as they were in themselves unjust, that the effects were more innocent than the cause, that they were more contrary to equity than prejudicial to its rights, more unreasonable than tyrannical.

CHAP. XVI.

In what manner the Custom of Judicial Combats gained Ground.

FROM Agobard's letter to Lewis the Pious, it might be inferred, that the custom of judicial combats was not established among the Franks: for after having represented to this prince the abuses of the law of Gundebald, he desires * that private disputes should be decided in Burgundy by the law of the Franks. But as it is well known from other quarters, that the trial by combat prevailed at that time in France, this has been the cause of some perplexity. However the difficulty may be solved by what I have said; the law of the Salian Franks did not allow of this kind of trial, and that of the Ripuarian Franks (a) did.

But, notwithstanding the clamours of the clergy, the custom of judicial combats gained ground continually in France; and I shall make it appear presently that the clergy themselves were in great part the occasion of it.

It is the law of the Lombards that furnishes us with this proof. There has been long since a detestable custom introduced, says the preamble to the constitution of (b) Ortho II. This is, that if the title to an estate was said to be false, the person who claimed under that title made oath upon the gospels that it was genuine; and without any further judgment he took possession

* Si placeret Domino nostro ut eos transferret ad legem Francorum.

(a) See this law, tit. 59. § 4. and tit. 67. § 5.

(b) Law of the Lombards, book 2. tit. 55. chap. 34.

session of the estate ; so that they who would perjure themselves were sure of gaining their point. The Emperor Otho I. having caused himself to be crowned at Rome (a) at the very time that a council was held there under Pope John XII. all the lords * of Italy represented to the emperor the necessity of enacting a law to reform this horrid abuse. The Pope and the Emperor were of opinion, that the affair should be referred to the council, which was to be shortly held † at Ravenna. There the lords made the same representations, and repeated their instances ; but the affair was put off once more under pretence of the absence of particular persons. When Otho II. and Conrad ‡ king of Burgundy arrived in Italy, they had a conference at Verona || with the Italian lords ** ; and at their repeated remonstrances, the emperor, with their unanimous consent, made a law, that whenever there happened any disputes about inheritances, and one of the parties insisted upon the legality of his title, and the other maintained its being false, the affair should be decided by combat ; that the same rule should be observed in contests relating to fiefs ; and that the clergy should be subject to the same law, but should fight by their champions. Here we see that the nobility insisted on the trial by combat, because of the inconveniency of the proof introduced by the clergy ; that notwithstanding the clamours of this nobility, the notorioufness or the abuse which called out loudly for redress, and the authority of Otho who came into Italy to speak and act as master, still the clergy held out in two councils ; in fine, that the joint concurrence of the nobility and princes having obliged the clergy to submit, the custom of judicial combats must have been considered

(a) The year 962.

* Ab Italise proceribus est proclamatum, ut imperator sanctus mutata lege, facinus indignum destrueret. Law of the Lombards, book 2. tit. 55. chap. 34.

† It was held in the year 967, in the presence of Pope John XIII. and of the Emperor Otho I.

‡ Otho the second's uncle, son to Rodolphus, and king of Transjuran Burgundy.

|| In the year 988.

** Cum in hoc ab omnibus imperiales aures pulsarentur. Law of the Lombards, book 2. tit. 55. chap. 34.

sidered as a privilege of the nobility, as a barrier against injustice, and as a security of property, and from that very moment this custom must have gained ground. This was effected at a time when the power of the emperors was great, and that of the popes inconsiderable ; at a time when the Otho's came to revive the dignity of the empire in Italy.

I shall make one reflection, which will corroborate what has been above said, namely, that the custom of negative proofs produced that of judicial combat. The abuse complained of to the Otho's, was that a person who was charged with having a false title to an estate, defended himself by a negative proof, declaring upon the gospels it was not false. What was it they did to reform this abuse ? They revived the custom of judicial combats.

I was in a hurry to speak of the constitution of Otho II. in order to give a clear idea of the disputes between the clergy and the laity of those times. There had been indeed a constitution of * Lotharius I. of an earlier date, who, upon the same complaints and disputes, being desirous of securing the just possession of property, had ordained that the notary should make oath that the deed or title was not forged ; and if the notary should happen to die, the witnesses should be sworn who had signed it. The evil however still continued, till they were obliged at length to have recourse to the remedy above-mentioned.

Before that time, I find, that in the general assemblies held by Charlemagne, the nation represented to him (a), that in the actual state of things it was extremely difficult, but that either the accuser or the accused must forswear themselves ; and that for this reason it was much better to revive the judicial combat ; which was accordingly done.

The usage of judicial combats gained ground among the Burgundians, and that of the oath was limited. Among the Goths the

* In the law of the Lombards, book 2. tit. 55. § 33. In the copy which Muratori made use of, it is attributed to the emperor Guido.

(a) In the law of the Lombards, book 2. tit. 55. § 23.

the laws of Chindasuinthus and Reccesuinthus left not the least vestige of the trial by combat; this custom had been restrained by the clergy; but in process of time * those people put a stop to the violence which they had suffered in this respect.

The first kings of the Lombards gave a check to the (a) custom of judicial combat. Charlemagne (b), Lewis the Pious, and the Otho's, made divers general constitutions, which we find inserted in the Laws of the Lombards, and added to the Salic laws, whereby the practice of legal duels, at first in criminal and afterwards in civil affairs, obtained a greater extent. They knew not what to do. The negative proof by oath had its inconveniencies; that of legal duels had its inconveniencies also; hence they often changed according as the one or the other affected them most.

On the one hand, the clergy were pleased to see, that in all secular affairs people were obliged to have recourse to the altars †; and on the other, a haughty nobility were fond of maintaining their rights by the sword.

I would not have it inferred, that it was the clergy who introduced the custom so much complained of by the nobility. This custom was derived from the spirit of the Barbarian laws, and from the establishment of negative proofs. But a practice that contributed to the impunity of such a number of criminals, having given some people reason to think that it was proper to make use of the sanctity of the churches in order to strike terror into the guilty, and to intimidate perjurers, the clergy main-

VOL. II.

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* In palatio quoque, Bera comes Barcinonensis, cum impeteretur a quodam Sunila, & infidelitas argueretur, cum eodem secundum legem propriam utpote quia uterque Gothus erat, equestri praelio congressus est & victus. I cannot recollect where I had this passage from.

(a) See in the law of the Lombards, book i. tit. 4. and tit. 9. § 23. and book ii. tit. 35. § 4. and 5. and tit. 55. § 1. 2. and 3. The regulations of Rotharis; and in § 15. that of Luitprandus.

(b) Ibid. book ii. tit. 55. § 23.

† The judicial oaths were made at that time in the churches, and during the first race of our kings, there was a chapel set apart in the Royal Palace, for the affairs that were to be thus decided. See the Formulas of Marculfus, book i. chap. 38. The laws of the Ripuarians, tit. 59. § 4. tit. 65. § 5. The history of Gregory of Tours, the Capitulary of the year 803, added to the Salic law.

tained this usage, and the practice that attended it ; for in other respects they were absolutely averse to negative proofs. We find in Beaumanoir (a), that this kind of proof was never allowed in ecclesiastic courts ; which contributed greatly without doubt to its suppression, and to weaken in this respect the regulation of the codes of the Barbarian laws.

This will convince us more strongly of the connection between the usage of negative proofs, and that of judicial combats, of which I have said so much. The lay-tribunals admitted of both ; and both were rejected by the ecclesiastic courts.

In choosing the trial by duel, the nation followed its military spirit : for while the trial by duel was established as a divine decision, the trials by the crosses, by cold or boiling water, which had been also regarded as divine decisions, were abolished.

Charlemagne ordained, that if any differences should arise between his children, they should be terminated by the judgment of the crosses. Lewis the Pious * confined this judgment to ecclesiastic affairs ; his son Lotharius abolished it in all cases ; nay, he abolished † even the trial by cold water.

I do not pretend to say, that at a time when so few usages were universally received, these trials were not revived in some churches ; especially as they are mentioned in a charter (b) of Philip-Augustus : but I affirm they were very little used. Beaumanoir (c), who lived at the same time as St Lewis, a little after, enumerating the different kinds of trials, mentions that of judicial combat, but not a word of the others.

CHAP.

(a) Chap. 39. page 212.

* We find his constitutions inserted in the laws of the Lombards, and at the end of the Salic laws.

† In a constitution inserted in the law of the Lombards, book ii. tit. 55. § 31.

(b) In the year 1200.

(c) Custom of Beauvoisis, chap. 39.

CHAP. XVII.

A new reason of the Disuse of the Salic and Roman Laws, as also of the Capitularies.

I HAVE already mentioned the reasons that occasioned the disuse of the Salic and Roman Laws, as also of the Capitularies ; here I shall add that the principal cause was the great extent given to judiciary combats.

As the Salic laws did not admit of this custom, they became in some measure useless, and fell into oblivion. In like manner the Roman laws, which also rejected this custom, were laid aside : their whole attention was then taken up in establishing the law of judicial combats, and in forming a proper digest of the several cases that might happen on those occasions. The regulations of the Capitularies became also of no manner of service. Thus it is that such a number of laws lost all their authority, without our being able to tell the precise time it was lost ; they fell into oblivion, and we cannot find any others that were substituted in their place.

Such a nation had no need of written laws ; hence its written laws might very easily fall into disuse.

If there happened to be any disputes between two parties, they had only to order a single combat. For this no great knowledge or abilities were requisite.

All civil and criminal actions are reduced to facts. It is upon these facts they fought ; and not only the substance of the affair, but likewise the incidents and imparlances were decided by combat, as Beaumanoir (a) observes, who produces several instances.

I find, that towards the commencement of the third race, the jurisprudence of those times related entirely to personal quarrels,

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(a) Chap. 61. page 309 and 310.

quarrels, and was governed by the point of honour. If the judge was not obeyed, he insisted upon satisfaction from the person that had contemned his authority. At Bourges, if (b) the provost had summoned a person, and he refused to come, his way of proceeding was to tell him, "I sent for thee, and "thou didst not think it worth thy while to come; I demand "therefore satisfaction for this contempt." Upon which they fought. Lewis the Fat reformed this custom (c).

The custom of legal duels prevailed (d) at Orleans, even in all demands of debt. Lewis the Young declared, that this custom should take place only when the demand exceeded five sous. This ordinance was a local law; for in St Lewis's time (e) it was sufficient that the value was more than twelve deniers. Beaumanoir (f) heard a gentleman of the law affirm, that formerly there had been a bad custom in France, of hiring a champion for a certain time to fight their battles in all causes. This shews, that the usage of judiciary combats must have had at that time a prodigious extent.

CHAP. XVIII.

Origin of the Point of Honour.

WE meet with inexplicable enigma's in the codes of the laws of the Barbarians. The law of (g) the Frisians allows only half a sou in composition to a person that had been beaten with a stick; and yet for ever so small a wound it allows more. By the Salic law, if a freeman gave three blows with a stick to another freeman, he paid three sous; if he drew blood, he was punished

(b) Charter of Lewis the Fat in the year 1145. In the Collection of Ordinances.

(c) Ibid.

(d) Charter of Lewis the Young in the year 1168, in the Collection of Ordinances.

(e) See Beaumanoir, chap. 63. page 325.

(f) See the Custom of Beauvoisis, chap. 28, page 203.

(g) *Additio sapientum Willemari*, tit. 5.

punished as if he had wounded him with steel, and he paid fifteen sous : thus the punishment was proportioned to the greatness of the wound. The law of the Lombards (a) established different compositions for one, two, three, four blows, and so on. At present a single blow is equivalent to a hundred thousand.

The Constitution of Charlemagne inserted in the law (b) of the Lombards, ordains, that those who were allowed the trial by combat, should fight with bastons. Perhaps this was out of regard to the clergy ; or probably, as the usage of legal duels gained ground, they wanted to render them less sanguinary. The capitulary * of Lewis the Pious allows the liberty of chusing to fight either with the sword or baston. In process of time none but bond men fought with the baston (c).

Here I see the first rise and formation of the particular articles of our point of honour. The accuser began with declaring in the presence of the judge, that such a person had committed such an action ; and the accused made answer, that he lied (d) ; upon which the judge gave orders for the duel. It became then an established rule, that whenever a person had the lie given him, it was incumbent on him to fight.

Upon a man's (e) declaring he would fight, he could not afterwards depart from his word ; if he did, he was condemned to a penalty. Hence this rule ensued, that whenever a person had engaged his word, honour forbid him to recall it.

Gentlemen * fought one another on horseback, and armed at all points ; villains † fought on foot, and with bastons. Hence it followed, that the baston was looked upon as the instrument of

(a) Book i. tit. 6. § 3.

(b) Book ii. tit. 5. § 23.

* Added to the Salic law, in 819.

(c) See Beaumanoir, chap. 64. page 328.

(d) Ibid.

(e) See Beaumanoir, chap. 3. page 25, and 329.

* See in regard to the arms of the combatants. Beaumanoir, chap. 61. page 308. and chap. 64. page 328.

† Ibid. chap. 64. page 328. See also the charters of St Aubin of Anjou, quoted by Galland, page 263.

of insults and affronts ‡; because, to strike a man with it, was treating him like a villain.

None but villains fought with their || faces uncovered; so that none but they could receive a blow on the face. Therefore a box on the ear became an injury that must be expiated with blood, because the person who received it had been treated as a villain.

The several people of Germany were no less sensible than we of the point of honour; nay, they were more so. Thus the most distant relations took a very considerable share to themselves in every affront, and on this all their codes are founded. The (d) law of the Lombards ordains, that whosoever goes attended with servants to beat a man by surprise, in order to load him thereby with shame, and to render him ridiculous, should pay half the composition which he would owe if he had killed him (e); and if through the same motive he tied or bound him; he should pay three quarters of the same composition.

Let us then conclude, that our forefathers were extremely sensible of affronts; but that affronts of a particular kind, such as being struck with a certain instrument on a certain part of the body, and in a certain manner, were as yet unknown to them. All this was included in the affront of being beaten, and in this case, the proportion of the excess constituted the greatness of the outrage.

CHAP.

‡ Among the Romans it was not infamous to be beaten with a stick, lege ictus fustium, de iis qui notantur infamia.

|| They had only the baston and buckler. Beaumanoir, chap. 64. page 328.

(d) Book i. tit. 6. § 1.

(e) Book i. tit. 6. § 2.

CHAP. XIX.

A new Reflexion upon the Point of Honour among the Germans.

“IT was a great infamy, says Tacitus (b), among the Germans, for a person to leave his buckler behind him in battle; for which reason a great many after a misfortune of this kind have destroyed themselves.” Thus the ancient Salic law (c) allows a composition of fifteen sous to any person that had been injuriously reproached with having left his buckler behind him.

When Charlemagne * amended the Salic law, he allowed in this case no more than three sous in composition. As this prince cannot be suspected of having had a design to enervate the military discipline; it is manifest that this change was owing to that of the arms, and that from this change of arms a great number of usages derive their origin.

CHAP. XX.

Of the Manners relative to Judicial Combats.

OUR connexion with the fair sex is founded on the happiness attending the pleasure of enjoyment; on the charms of loving and being beloved; and likewise on the desire of pleasing the ladies, because they are most penetrating judges in respect to part of those things which constitute personal merit. This general desire of pleasing produces gallantry, which is not indeed love itself, but the delicate, the volatile, the perpetual dissembler of love.

According

(b) De moribus Germanorum.

(c) In the Pactus legis Salicæ.

* We have both the ancient law and that which was amended by this prince.

According to the different circumstances of every country and age, love inclines more to one of those three things, than to the other two. Now I maintain, that the prevailing spirit at the time of our judicial combats, must naturally have been that of gallantry.

I find in the law of the Lombards (a), that if one of the two champions was found to have any herbs fit for enchantment about him, the judge ordered them to be taken from him, and obliged him to swear he had no more. This law could be founded only on the vulgar opinion; it was fear (which has been said to have invented so many things) that made them imagine this kind of prestiges. As in the single combats, the champions were armed at all points; and as with heavy arms, both of the offensive and defensive kind, those of particular temper and force were of infinite advantage; the notion of some champions having enchanted arms, must certainly have turned the brains of a great many people.

Hence arose the marvellous system of chivalry. The minds of all sorts of people quickly imbibed these extravagant ideas. Then it was that in romances they beheld knight-errants, necromancers, fairies, winged or intelligent horses, invisible or invulnerable men, magicians who concerned themselves in the birth and education of great personages, enchanted and disenchanted palaces, a new world in the midst of the old one, and the ordinary course of nature left only to the lower class of mankind.

Knight-errants always in armour, in a part of the world full of castles, forts, and robbers, found honour in punishing injustice, and in protecting weakness. Hence our romances abound with gallantry founded on the idea of love, joined with that of strength and protection.

Such was the original of gallantry, when they formed to their imaginations an extraordinary set of men, who at the sight of
virtue

(a) Book ii. tit. 55. § 11.

virtue joined with beauty and distress, were inclined to expose themselves to all hazards for their sake, and to endeavour to please them in the common actions of life.

Our romances of chivalry flattered this desire of pleasing, and communicated to a part of Europe that spirit of gallantry, which we may venture to affirm was very little known to the ancients.

The prodigious luxury of that immense city Rome, flattered the idea of sensible pleasures. A certain notion of tranquillity in the fields of Greece, gave rise to the description * of soft and amorous sentiments. The idea of knight-errants, protectors of the virtue and beauty of the fair sex, led people to that of gallantry.

This spirit was continued by the custom of tournaments, which, uniting the rights of valour and love, added still a great importance to gallantry.

CHAP. XXI.

Of the Code of Laws on Judicial Combats.

SOME perhaps will have a curiosity to see this monstrous custom of judiciary combat reduced to principle, and to find a code of such extraordinary laws. Men, reasonable in the main, reduce their very prejudices to rule. Nothing was more contrary to good sense than those combats: and yet when once this point was laid down, a kind of prudential management was used in carrying it into execution.

In order to be thoroughly acquainted with the jurisprudence of those times, it is necessary to read with attention the regulations of St Lewis, who made such great changes in the judiciary order. Defontaines was contemporary with that prince: Beau-

VOL. II.

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* See the Greek romances of the middle age.

manoir wrote after † him; and the rest lived since his time. We must therefore look for the ancient practice in the amendments that have been made of it.

CHAP. XXII.

Rules established in the Judicial Combat.

WHEN there happened (a) to be several accusers, they were obliged to agree among themselves that the action might be carried on by a single prosecutor; and if they could not agree, the person before whom the action was brought, appointed one of them to prosecute the quarrel.

When (b) a gentleman challenged a villain, he was obliged to present himself on foot with buckler and baston; but if he came on horseback, and armed like a gentleman, they took his horse and his arms from him; and stripping him to his shirt, they obliged him to fight in that condition with the villain.

Before the combat the (c) magistrates ordered three banns to be published. By the first the relations of the parties were commanded to retire; by the second the people were warned to be silent; and the third prohibited the giving any assistance to either of the parties under severe penalties; nay, even on the pain of death, if by this assistance either of the combatants should happen to be vanquished.

The officers belonging to the civil magistrates (d) guarded the list or inclosure where the battle was fought; and in case either of the parties declared himself desirous of peace, they took particular notice of the actual state in which things stood at that very moment, to the end that they might be restored to

† In the year 1283.

(a) Beaumanoir, chap. 6. page 40. and 41.

(c) Ibid. page 330.

(b) Beaumanoir, chap. 64. page 328.

(d) Ibid.

to the same situation, in case they did not come to an accommodation (e).

When the pledges were received either for a crime or for false judgment, parties could not make up the matter without the consent of the lord : and when one of the parties was overcome, there could be no accommodation without the permission of the count *, which had some analogy to our letters of grace.

But if it happened to be a capital crime, and the lord, corrupted by presents, consented to an accommodation, he was obliged to pay a fine of sixty livres, and the right † he had of punishing the malefactor devolved to the count.

There were a great many people incapable either of offering, or of accepting battle. But liberty was given them in trial of the cause to chuse a champion ; and that he might have a stronger interest in defending the party, in whose behalf he appeared, his hand was cut off if he lost the battle ‡.

When capital laws were made in the last century against duels, perhaps it would have been sufficient to have deprived a warrior of his military capacity, by the loss of his hand ; nothing in general being a greater mortification to mankind than to survive the loss of their character.

When (a) in capital cases the duel was fought by champions, the parties were placed where they could not behold the battle ; each was bound with the cord that was to be used at his execution, in case his champion was overcome.

The person that succumbed in battle, did not always lose the point contested ; if, for instance (b), they fought on an imparlance, he lost only the imparlance.

F f 2

CHAP.

(e) Ibid.

* The great vassals had particular privileges.

† Beaumanoir, chap. 64. page 330. says he lost his jurisdiction : these words in the authors of those days have not a general signification, but a signification limited to the affair in question. Defontaines, chap. 21. art. 29.

‡ This custom, which we meet with in the capitularies, was still subsisting at the time of Beaumanoir, See chap. 61. page 315.

(a) Beaumanoir, chap. 64. page 130.

(b) Ibid. chap. 61. page 309.

CHAP. XXIII.

Of the Bounds prescribed to the Custom of Judicial Combats.

WHEN pledges of battle had been received upon a civil affair of small importance, the lord obliged the parties to withdraw them.

If a fact was notorious (a), for instance, if a man had been assassinated in the open market-place, then there was neither a trial by witnesses, nor by combat; the judge gave his decision from the notoriety of the fact.

When the court of a lord had often determined after the same manner, and the usage was thus known (b), the lord refused to grant the parties the privilege of duelling, to the end that the usages might not be altered by the different events of the combats.

They were not allowed to insist upon duelling but for (c) themselves, for some one belonging to their family, or for their liege lord.

When the accused had been acquitted (d), another relation could not insist on fighting him; otherwise disputes would never be terminated.

If a person appeared again in public, whose relations, upon a supposition of his being murdered, wanted to avenge his death, there was then no room for a combat: the same may be said (e) if by a notorious absence the fact was proved to be impossible.

If a man (f) who had been mortally wounded, had disculpated before his death the person accused, and named another, they

(a) Beaumanoir, chap. 61. page 308. *ibid.* chap. 43. page 239

(b) Beaumanoir, chap. 61. page 314. See also Defontaines, chap. 23. art. 24.

(c) Beaumanoir, chap. 63. page 322.

(d) *Ibid.*

(e) *Ibid.*

(f) Beaumanoir, chap. 63, pag. 323.

they did not proceed to a duel; but if he had mentioned nobody, his declaration was looked upon only as a forgiveness on his death-bed; the prosecution was continued, and even among gentlemen they could make war against each other.

When there was a war, and one of the relations had given or received pledges of battle, the right of war ceased; for then it was thought that the parties wanted to pursue the ordinary course of justice, wherefore he that continued the war would have been obliged to repair all damages.

Thus the practice of judiciary combat had this advantage, that it was apt to change a general into a particular quarrel, to restore the courts of judicature to their authority, and to reduce to a civil state those who were no longer governed but by the law of nations.

As there are an infinite number of wise things that are managed in a very foolish manner; so there are many foolish things that are very wisely conducted.

When a man (a), who was challenged for a crime, visibly shewed that it had been committed by the appellant himself, there could be then no pledges of battle: for there is no criminal but would prefer a duel of uncertain event to a certain punishment.

There were no duels (b) in affairs decided by arbiters, or by ecclesiastic courts; nor in cases relating to women's dowries.

A woman, says Beaumanoir, cannot fight. If a woman appealed a person without naming her champion, the pledges of battle were not accepted. It was also requisite, that a woman should be authorized (c) by her baron, that is by her husband, to appeal; but she might be appealed without this authority.

If either the appellant (d) or the appellee were under fifteen years of age, there could be no combat. They might order it indeed

(a) Beaumanoir, chap. 63. pag. 324.

(b) Ibid. pag. 325.

(c) Ibid. page 325.

(d) Beaumanoir, chap. 63. p. 323. See also what I have said in the 18th book.

indeed in disputes relating to orphans, when their guardians or trustees were willing to run the risk of this procedure.

The cases in which a bondman was allowed to fight, are, I think, as follows. He was allowed to fight another bondman; he was allowed to fight a freeman, or even a gentleman, in case they were appellants; but if he was the appellant (e) himself, the other might refuse to fight; and even the bondman's lord had a right to take him out of the court. The bondman might by his lord's charter (f) or by usage, fight with any freeman; and the church * pretended to this right for her bondmen, as a mark of respect † due to her by the laity.

CHAP. XXIV.

Of the Judiciary Combat between one of the Parties, and one of the Witnesses.

BEAUMANOIR informs us, (a) that a person who saw a witness going to swear against him, might elude the second, by telling the judges, that his adversary produced a false and slandering witness; and if the witness was willing to maintain the quarrel, he gave pledges of battle. They troubled themselves no further about the inquest; for if the witness was overcome, it was decided, that the party had produced a false witness, and he lost his cause.

It was necessary the second witness should be prevented from swearing; for if he had made his attestation, the affair would have been decided by the deposition of two witnesses. But by staying the second, the deposition of the first witness was of no manner of use.

The

(e) Beaumanoir, chap. 63. p. 322.

(f) Defontaines, ch. 22. art. 7.

* Habeant bellandi et testificandi licentiam. Charter of Lewis the Fat, in the year 1118.

† Ibidem.

(a) Chap. 61. p. 315.

The second witness being thus rejected, the party was not allowed to produce any others, but he lost his cause; in case however there had been no pledges of battle, he might produce other witnesses.

Beaumanoir observes, (b) that the witness might say to the party he appeared for, before he made his deposition: *I do not care to fight for your quarrel, nor to enter into any debate; but if you are willing to stand by me, I am ready to tell the truth.* The party was then obliged to fight for the witness, and if he happened to be overcome, he did not lose his cause †, but the witness was rejected.

This, I believe, was a limitation of the ancient custom; and what makes me think so, is, that we find this usage of appealing the witnesses, established in the laws of the (c) Bavarians and (d) Burgundians, without any restriction. I have already made mention of the constitution of Gundebald, against which Agobard * and St. Avitus † made such loud complaints. "When the accused (says this prince) produces witnesses to swear that he has not committed the crime, the accuser may challenge one of the witnesses to a combat; for it is very just that the person who has offered to swear, and has declared that he was certain of the truth, should make no difficulty to maintain it." Thus the witnesses were deprived by this king of every kind of subterfuge to avoid the judiciary combat.

CHAP. XXV.

Of the Judicial Combat between one of the Parties, and one of the Lord's Peers. Appeal of false Judgment.

AS the nature of judicial combats was to terminate the affair for ever, and was incompatible with (a) a new judgment and

(b) Chap. 6. p. 39, and 40.

(c) Tit. 16. §. 2,

(d) Tit. 45.

† But if the battle was fought by champions, the champion that was overcome had his hand cut off.

* Letter to Lewis the Pious.

† Life of St. Avitus.

(a) Beaumanoir, chap. 2. p. 22.

and new prosecutions; an appeal, such as is established by the Roman and Canon laws, that is to a superior court in order to rejudge the proceeding of an inferior court, was a thing unknown in France.

This is a form of proceeding to which a warlike nation, entirely governed by the point of honour, was quite a stranger; and agreeably to this very spirit the same methods (b) were used against the judges, as were allowed against the parties.

An appeal among the people of this nation was a challenge to fight with arms, a challenge decided by blood, and not by an invitation to a paper quarrel, the knowledge of which was deferred to succeeding ages (c).

Thus St. Lewis in his institutions says, that an appeal includes both felony and iniquity. Thus Beaumanoir tells us, that if a vassal (d) wanted to make his complaint of any outrage committed against him by his lord, he was first obliged to denounce that he quitted his fief; after which he appealed before his lord paramount, and offered pledges of battle. In like manner the lord renounced the homage of his vassal, if he appealed him before the court.

A vassal to appeal to his lord of false judgment, was telling him that his sentence was unjust and malicious; now, to utter such words against his lord, was in some measure committing the crime of felony.

Hence, instead of bringing an appeal of false judgment against the lord, who established and directed the court, they appealed the peers of whom the court itself was formed; by this means they avoided the crime of felony; for they insulted only their peers, with whom they could always account for the insult.

It

(b) Beaumanoir c. 61. p. 312. & ch. 67. p. 338.

(c) Book 2, ch. 15.

(d) Beaumanoir c. 61. p. 310. & ch. 67. p. 337.

It was a very (a) dangerous thing to appeal the peers of false judgment. If the party waited till judgment was pronounced, he was obliged to fight them all (b), when they offered to make good their judgment. If the appeal was made before all the judges had given their opinion, he was obliged to fight all those who had agreed in their judgment. In order to avoid this danger, it was usual to petition the lord (c) to give orders that each peer should give his opinion out loud; and when the first had pronounced, and the second was going to do the same, the party told him that he was a liar, a knave, and a slanderer, and then he had to fight only with that peer.

Defontaines * would have it that before an appeal was made of false judgments, it was customary to let three judges pronounce; and he does not say that it was necessary to fight them all three, and much less that there was any obligation to fight all those who had declared themselves of the same opinion. These differences arise from this, that there were very few usages exactly in all parts the same. Beaumanoir gives an account of what passed in the county of Clermont; and Defontaines of what was practised in Vermandois.

When (d) one of the peers had declared that he would maintain the judgment, the judge ordered the pledges of battle to be given, and likewise took security of the appellant that he would maintain his appeal. But the peer who was appealed gave no security, because he was the lord's vassal, and was obliged to defend the appeal, or to pay the lord a fine of sixty livres.

If the (e) appellant did not prove that the judgment was false, he paid the lord a fine of sixty livres, the same fine to (f) the peer whom he had appealed, and as much to every one of those who had openly consented to the judgment.

VOL. II.

G g

When

(a) Beaumanoir, chap. 61. p. 313.

(b) Ibid. p. 314.

(c) Ibid.

* Chap. 22. art. 1. 10. and 11. he says only that each of them was allowed a small fine.

(d) Ibid.

(e) Ibid. Defontaines chap. 22. art. 9.

(f) Ibid.

When a person violently suspected of a capital crime, had been taken and condemned, he would make no appeal (g) of false judgment; for he would always appeal, either to prolong his life, or to get an absolute discharge.

If a person (h) said that the judgment was false and bad, and did not offer to make his word good, that is, to fight, he was condemned to a fine of six sous if a gentleman, and to five sous if a bond-man, for the injurious expressions he had uttered.

The judge or peers (i) who were overcome, forfeited neither life nor limbs; but the person who appealed them was punished with death, if it happened to be a capital crime *.

This manner of appealing the peers of false judgment, was to avoid appealing the lord himself. But if (k) the lord had no peers, or had not a sufficient number, he might at his own expence hire peers † of his lord paramount; but these peers were not obliged to judge if they did not like it; they might declare that they were come only to give their opinion: in that particular case ‡, the lord himself pronounced sentence as judge; and if an appeal of false judgment was made against him, it was his business to stand the appeal.

If the lord happened (l) to be so very poor as not to be able to hire peers of his paramount, or if he neglected to ask for them, or the paramount refused to give them, then as the lord could not judge by himself, and as nobody was obliged to plead before a tribunal where judgment could not be given, the affair was brought before the lord paramount.

This

(g) Beaumanoir chap. 61. p. 316.

(h) Ibid. p. 314. Defontaines chap. 22. art. 21.

(i) Ibid. art. 7.

* See Defontaines chap. 21. art. 11. & 12. and following, who distinguishes the causes in which the appellant of false judgment loses his life, the point contested, or only the imparlance.

(k) Beaumanoir chap. 62. p. 322. Defontaines chap. 22.

† The count was not obliged to lend any. Beaumanoir chap. 67. p. 137.

‡ Nobody can pass judgment in his court, says Beaumanoir, chap. 67. p. 336. & 337.

(l) Beaumanoir, chap. 62, p. 322.

This, I believe, was one of the principal causes of the separation between the jurisdiction and the fief, from whence arose that maxim of the French lawyers, *The fief is one thing, and the jurisdiction another*. For as there were a vast number of peers who had no subordinate vassals under them, they were incapable of holding their court; all affairs were then brought before the lord paramount, and they lost the privilege of judging, because they had neither power nor will to claim it.

All the peers (m) who had agreed to the judgment, were obliged to be present when it was pronounced, that they might follow one another, and say *Yes* to the person who, wanting to make an appeal of false judgment, asked them whether they followed; for Defontaines says (n), *that it is an affair of courtesy and loyalty, and there is no such thing as evasion or delay*. From hence, I imagine, arose the custom still followed in England, of obliging the jury to be all unanimous in their verdict in cases relating to life and death.

Judgment was therefore given according to the opinion of the majority; and if there was an equal division, sentence was pronounced, in criminal cases, in favour of the accused; in cases of debt, in favour of the debtor; and in cases of inheritance, in favour of the defendant.

Defontaines observes (o), that a peer could not excuse himself by saying, that he would not sit in court if there were only four †, or if the whole number, or at least the wisest part, were not present. This is just as if he was to say in the heat of an engagement, that he would not assist his lord, because he had not all his vassals with him. But it was the lord's business to cause his court to be respected, and to chuse the bravest and most knowing of his tenants. This I mention in order to shew the duty of vassals, which was to fight and to judge; and

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such

(m) Defontaines, chap. 21. art. 27. & 28.

(n) Ibid. art. 28.

(o) Chap. 21. art. 37.

† This number at least was necessary. Defontaines, chap. 21. art. 36.

such indeed was this duty, that to judge was all the same as to fight.

It was lawful for a lord who went to law with his vassal in his own court, and was cast, to appeal one of his tenants of false judgment. But as the latter owed a respect to his lord for the fealty he had vowed, and the lord on the other hand owed benevolence to his vassal for the fealty accepted; hence it was customary to make a distinction between the lord's affirming in general, that the judgment (a) was false and unjust, and imputing personal (b) prevarications to his tenant. In the first case, he affronted his own court, and in some measure himself, so that there was no room for pledges of battle. But there was room in the second, because he attacked his vassal's honour; and the person overcome was deprived of life, and property, in order to maintain the public tranquillity.

This distinction, which was necessary in that particular case, had afterwards a greater extent. Beaumanoir says, that when the appellant of false judgment attacked one of the peers by personal imputations, then battle ensued; but if he attacked only the judgment, the peer appealed was at liberty (c) to determine the dispute either by battle, or by law. But as the prevailing spirit in Beaumanoir's time was to restrain the usage of judicial combats, and as this liberty which had been granted to the peer appealed, of defending the judgment by combat or not, is equally contrary to the ideas of honour established in those days, and to the obligation the vassal lay under of defending his lord's jurisdiction; I am apt to think that this distinction of Beaumanoir's was owing to a new regulation among the French.

I would not have it thought, that all appeals of false judgment were decided by battle; it fared with this appeal as with all others. The reader may recollect the exceptions mentioned in

(a) Beaumanoir chap. 67: page 337.

(b) Ibid.

(c) Ibid.

in the 3d chapter. Here it was the business of the superior court to examine whether it was proper to withdraw the pledges of battle or not.

There could be no appeal of false judgment against the king's court; because as there was no one equal to the king, no one could appeal him; and as the king had no superior, none could appeal from his court.

This fundamental religion, which was necessary as a political law, diminished also as a civil law the abuses of the judicial proceedings of those times. When a lord was afraid (a) that his court would be appealed of false judgment, or perceived that they were determined to appeal; if justice required there should be no appeal, he might petition for peers from the king's court, who could not be appealed of false judgment. Thus king Philip, says Defontaines (b), sent his whole council to judge an affair in the court of the abbot of Corbey.

If the lord could not have judges from the king, he might remove his court into the king's, if he held immediately of him: but if there were intermediate lords, he had recourse to his paramount, going from one lord to another, till he came to the sovereign.

Thus, notwithstanding they had not in those days neither the practice nor even the idea of our modern appeals, yet they had recourse to the king, who was the source from whence all those rivers flowed, and the sea into which they returned.

CHAP.

(a) Defontaines, chap. 22. art. 14.

(b) Ibid.

CHAP. XXVI.

Of the Appeal of Default of Justice.

THE appeal of default of justice was when the court of a particular lord deferred, evaded, or refused to do justice to the parties.

During the time of our princes of the second race, though the count had several officers under him, their person was subordinate, but not their jurisdiction. These officers in their court-days, assizes, or *placita*, gave judgment in the last resort as the count himself; all the difference consisted in the division of the jurisdiction. For instance, the count had (a) the power of condemning to death, of judging of liberty, and of the restitution of goods, which the *centenarii* had not.

For the same reason, there were higher causes (b) reserved to the king; namely, those which directly concerned the political order of the state. Such were the disputes between bishops, abbots, counts, and other grandees, whom the kings judged together with the great vassals*.

What some authors have advanced, namely, that an appeal lay from the count to the king's commissary, or *missus dominicus*, is not well grounded. The count and the *missus* had an equal jurisdiction (c) independent of each other; the whole difference was (d), that the *missus* held his *placita* or assizes four months in the year, and the count the other eight.

If a person who had been condemned at an assize †, demanded to have his cause tried over again, and was afterwards cast, he

(a) Third Capitulary of the year 812, art. 3. edition of Baluzius, page 497. and of Charles the Bald, added to the law of the Lombards, book 2, art. 3.

(b) Third capitulary of the year 812. art. 2. edition of Baluzius, page 497.

* Cum fidelibus. Capitulary of Lewis the Pious, edition of Baluzius, page 667.

(c) See the capitulary of Charles the Bald, added to the law of the Lombards, book 1. art. 3.

(d) Third capitulary of the year 812. art. 8.

† Placitum.

He paid a fine of fifteen fous, or received fifteen blows from the judges who had decided the affair.

When the counts or the king's commissaries did not find themselves able to bring the great lords to reason, they made them give bail or security ‡, that they would appear in the king's court; this was to try the cause, and not to rejudge it. I find in the capitulary of Metz ||, a law, by which the appeal of false judgment to the king's court is established, and all other kinds of appeal proscribed and punished.

If they refused to submit to the judgment of the sheriffs *, and made no complaint, they were imprisoned till they had submitted: but if they complained, they were conducted under a proper guard before the king, and the affair was examined in his court.

There could be hardly any room then for an appeal of default of justice. For so far was it from being usual in those days to complain, that the counts and others, who had a right of holding assizes, were not exact in discharging this duty; that (a) on the contrary, it was a general complaint that they were too exact. Hence we find such numbers of ordinances, by which the counts, and all other officers of justice whatsoever, are forbid to hold their assizes above thrice a-year. It was not so necessary to chastise their indolence, as to check their activity.

But, after an innumerable multitude of petty lordships had been formed, and different degrees of vassalage established, the neglect of certain vassals in holding their courts gave rise to this kind of appeal †; especially as very considerable profits accrued to the lord paramount from the several fines.

As

‡ This appears by the formulas, charters, and the capitularies.

|| In the year 757, edition of Baluzius, page 185, art. 9. and 10. and the Synod apud Ver-nas in the year 755. art. 29. edition of Baluzius, page 175. These two capitularies were under king Pepin.

* The officers under the count, Scabini.

(a) See the law of the Lombards, book 2. tit. 52. art. 22.

† There are instances of appeals of default of justice as early as the time of Philip Augustus.

As the custom of judicial combats gained every day more ground, there were places, cases, and times, in which it was difficult to assemble the peers, and consequently in which justice was delayed. The appeal of default of justice was therefore introduced, an appeal that has been often a remarkable æra in our history ; because most of the wars of those days were imputed to a violation of the political law ; as the cause, or at least the pretence of our modern wars, is the infringement of the law of nations.

Beaumanoir (b) says, that in the case of default of justice, battle was not allowed ; the reasons are these : 1. They could not challenge the lord, because of the respect due to his person ; neither could they challenge the lord's peers, because the case was clear, and they had only to reckon the days of the summons, or of the other delays ; there had been no judgment passed, consequently there could be no appeal of false judgment : in fine, the crime of the peers offended the lord as well as the party, and it was against rule that there should be a battle between the lord and his peers.

But (c) as the default was proved by witnesses before the superior court, the witnesses might be challenged, and then neither the lord nor his court were offended.

In case the default was owing to the lord's tenants or peers by deferring justice, or by evading judgment after past delays, then these peers were appealed of default of justice before the paramount ; and if they were cast, they (d) paid a fine to their lord. The latter could not give them any assistance ; on the contrary, he seized their fief till they had each paid a fine of sixty livres.

2. When the default was owing to the lord, which was the case whenever there happened not to be a sufficient number of
peers

(b) Chap. 61. page 315.

(c) Ibid.

(d) Defontaines, chap. 21. art. 24.

peers in his court to pass judgment, or when he had not assembled his tenants, or appointed somebody in his room to assemble them, an appeal might be made of the default before the lord paramount; but then the party, and not the lord, was summoned, because of the respect due to the latter.

The lord demanded to be tried before the paramount, and if he was acquitted of the default, the cause was remanded to him, and he was likewise paid a fine of (d) sixty livres. But if the default was proved, the penalty (e) inflicted on him was to lose the judgment of the cause, which was to be then tried in the superior court. In fact, the complaint of default was made with no other view.

3. If the lord was sued * in his own court, which never happened but upon disputes relating to the fief; after letting all the delays pass, the lord himself (f) was summoned before the peers in the sovereign's name, whose permission was necessary on that occasion. The peers did not make the summons in their own name, because they could not summon their lord, but they could (g) summon for their lord.

Sometimes (h) the appeal of default of justice was followed with an appeal of false judgment, when the lord had caused judgment to be passed, notwithstanding the default.

The vassal † who had wrongfully appealed his lord of default of justice, was sentenced to pay a fine according to his lord's pleasure.

VOL. II.

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The

(d) Beaumanoir, chap. 61. page 312.

(e) Defontaines, chap. 21. art. 29.

* This was the case in the famous difference between the lord of Nelle and Joan countess of Flanders, under the reign of Lewis VIII. He sued her in her own court of Flanders, and summoned her to give judgment within forty days, and afterwards appealed in default of justice to the king's court. She answered, he should be judged by his peers in Flanders. The king's court determined that he should not be remanded, and that the countess should be summoned.

(f) Beaumanoir, chap. 61. page 34.

(g) Defontaines, chap. 21. art. 9.

(h) Beaumanoir, chap. 61. page 34.

† Beaumanoir, chap. 16. page 312. But he that was neither tenant nor vassal to the lord, paid only a fine of sixty livres. Ibid.

The inhabitants of Gaunt (d) had appealed the Earl of Flanders of default of justice before the king, for having delayed to give judgment in his own court. Upon examination it was found, that he had used less delays than even the custom of the country allowed. They were therefore remanded to him; upon which their effects to the value of sixty thousand livres were seized. They returned to the king's court in order to have this fine moderated; but it was decided that the Earl might insist upon this fine, and even more if he pleased. Beaumanoir was present at those judgments.

4. In other disputes which the lord might have with his vassal, in respect to the body or honour of the latter, or to goods that did not belong to the fief, there was no room for an appeal of default of justice; because the cause was not tried in the lord's court, but in that of the paramount; vassals, says Defontaines (a), having no power to give judgment on the body of their lord.

I have been at some trouble to give a clear idea of those things, which are so obscure and confused in old authors, that to draw them from the chaos in which they were involved, may be reckoned a new discovery.

CHAP. XXVII.

Epoch of the Reign of St Lewis.

ST Lewis abolished the judicial combats in all the courts of his demesne, as appears by the ordinance (b) he published on that account, and (c) by the institutions.

But

(d) Beaumanoir, chap. 61. page 318.

(a) Chap. 21. art. 35.

(b) In the year 1260.

(c) Book i. chap. 2. and 7. and book ii. chap. 10. and 11.

But he did not suppress them in the courts of his * barons, except in the case of appeal of false judgment.

A vassal could not appeal the court of his lord of false judgment, without demanding a judicial combat against the judges who had pronounced sentence. But St Lewis (d) introduced the practice of appealing of false judgment without fighting, a change that may be reckoned a kind of revolution.

He declared (e) that there should be no appeal of false judgment in the lordships of his demesne, because it was a crime of felony. In fact, it was a kind of felony against the lord; by a much stronger reason it was felony against the king. But he consented they might demand an amendment (f) of the judgments passed in his courts; not because they were false or iniquitous, but because they did some prejudice (g). On the contrary, he ordained, that they should be obliged to make an appeal of false judgment against the courts of the barons (h), in case of any complaint.

It was allowed by the institutions, as we have already observed, to bring an appeal of false judgment against the courts in the king's demesnes. They were obliged to demand an amendment before the same court; and in case the bailiff refused the amendment demanded, the king gave leave to make an appeal (i) to his court, or rather, interpreting the institutions by themselves, to present him a (k) request or petition.

With regard to the courts of the lords, St Lewis, by permitting them to be appealed of false judgment, would have the cause brought † before the royal tribunal, or that of the lord paramount,

H h 2

mount,

* As appears every where in the institutions, &c. and Beaumanoir, chap. 61. page 309.

(d) Institutions, book i. chap. 6. and book ii. chap. 15.

(e) Ibid. book ii. chap. 15.

(f) Ibid. book i. chap. 78. and book ii. chap. 15.

(g) Ibid. book i. chap. 78.

(h) Ibid. book ii. chap. 15.

(i) Institutions, book ii. chap. 78.

(k) Ibid. chap. 15.

† But if they wanted to appeal without falsifying the judgment, the appeal was not admitted. Institutions, book ii. chap. 15.

mount, not (l) to be decided by duel, but by witnesses, pursuant to a form of proceeding, the rules of which he laid down in the institutions (m).

Thus, whether they could falsify the judgment, as in the courts of the barons, or whether they could not falsify, as in the courts of his demesne, he ordained that they might appeal without running the hazard of a duel.

Defontaines (n) gives us the two first examples he ever saw, in which they proceeded thus without a legal duel; one in a cause tried at the court of St Quintin, which belonged to the king's demesne; and the other in the court of Ponthieu, where the count who was present opposed the ancient jurisprudence: but these two causes were decided by law.

Here perhaps it will be asked, why St Lewis ordained for the courts of his barons a different form of proceeding from that which he had established in the courts of his demesne? The reason is this: when St Lewis made the regulations for the courts of his demesnes, he was not checked or confined in his views: but he had measures to keep with the lords who enjoyed this ancient prerogative, that causes should not be removed from their courts, unless the party was willing to expose himself to the dangers of an appeal of false judgment. St Lewis preserved the usage of this appeal; but he ordained that it should be made without a judicial combat; that is, in order to render the change more insensible, he suppressed the thing and continued the terms.

This regulation was not universally received in the courts of the lords. Beaumanoir (o) says; that in his time there were two ways of judging; one according to the king's establishment, and the other pursuant to the ancient practice; that the lords were at liberty to follow which way they pleased; but when

(l) Book i. chap. 6. and 47. and book ii. chap 15. and Beaumanoir, chap 11. page 58.

(m) Book i. chap. 1. 2. and 3.

(n) Chap. 22. art. 16, 17.

Chap. 61. page 309.

when they had pitched upon one in any cause, they could not afterwards have recourse to the other. He adds (p), that the Count of Clermont followed the new practice, while his vassals kept to the old one; but that it was in his power to re-establish the ancient practice whenever he pleased, otherwise he would have less authority than his vassals.

It is proper here to observe, that France was at that time (q) divided into the country of the king's demesne, and that which was called the country of the barons, or the baronies; and, to make use of the terms of St Lewis's institutions, into the country under obedience to the king, and the country out of his obedience. When the kings made ordinances for the country of their own demesne, they employed their own single authority. But when they published any ordinances that concerned also the country of their barons, they were made * in concert with them, or sealed and subscribed by them: otherwise the barons received or refused them according as they seemed conducive to the good of their baronies. The rear-vassals were upon the same terms with the great vassals. Now the institutions were not made with the consent of the lords, though they regulated matters which to them were of great importance; but they were received only by those who believed they would redound to their advantage. Robert, son of St Lewis, received them in his county of Clermont; yet his vassals did not think proper to conform to this practice.

CHAP.

(p) Ibid.

(q) See Beaumanoir, Defontaines, and the institutions, book ii. chap. 10. 11. 15. and others.

* See the ordinances at the beginning of the third race in the collection of Lauriere, especially those of Philip Augustus, on ecclesiastic jurisdiction, and that of Lewis VIII, concerning the Jews, and the charters related by Mr Brussel, particularly that of St Lewis, on the lease and recovery of lands, and the feudal majority of young women, tom. ii. book 32. page 35. and *ibid.* The ordinance of Philip Augustus, page 7.

CHAP. XXVIII.

Observations on Appeals.

I APPREHEND that appeals, which were challenges to a combat, must have been made immediately on the spot. *If the party leaves the court without appealing, says Beaumanoir (r), he loses his appeal, and the judgment stands good.* This continued still in force, even after all the restrictions of (s) judicial combats.

The villain could not bring an appeal of false judgment against the court of his lord. This we learn from Defontaines (t), and is confirmed moreover by the institutions (u). Hence Defontaines (x) says, *Between the lord and his villain there is no other judge but God.*

It was the custom of judicial combats that had deprived the villains of the privilege of appealing their lord's court of false judgment. And so true is this, that those villains *, who by charter or custom had a right to fight, had also the privilege of appealing their lord's court of false judgment, even though the peers who judged them were † gentlemen: and Defontaines proposes expedients to gentlemen, in order to avoid the scandal of fighting with a villain, by whom they had been appealed of false judgment.

As.

(r) Chap. 63. page 327. *ibid.* chap. 61. page 312.

(s) See the institutions of St Lewis, book ii. chap 15. the Ordinance of Charles VII. in the year 1453.

(t) Chap. 21. art. 21. and 22.

(u) Book i. chap. 136.

(x) Chap. ii. art. 8.

* Defontaines, chap. 22. art. 7. This article and the 21st of the 22d chapter of the same author have been hitherto very ill explained. Defontaines does not oppose the judgment of the lord to that of the gentleman, because it was the same thing: but he opposes the common villain to him who had the privilege of fighting.

† Gentlemen may be always appointed judges. Defontaines, chap. 21. art. 48.

As the practice of judicial combats began to decline, and the usage of new appeals to be introduced, it was reckoned unjust that freemen should have a remedy against the injustice of the court of their lords, and the villain should not; hence the parliament received their appeals all the same as those of freemen.

When an appeal of false judgment was brought against the lord's court, the lord appeared in person before his paramount, to defend the judgment of his court. In like manner (a), in the appeal of default of justice, the party summoned before the lord paramount brought his lord along with him, to the end that if the default was not proved, he might recover his jurisdiction.

In process of time, as the practice observed in those two particular cases was become general, by the introduction of all sorts of appeals, it seemed very extraordinary that the lord should be obliged to spend his whole life in strange tribunals, and for other people's affairs. Philip of Valois (b) ordered, that none but the bailiffs should be summoned; and when the usage of appeals became still more frequent, the parties were obliged to defend the appeal: the fact † of the judge became that of the party.

I took notice (c) that in the appeal of default of justice, the lord lost only the privilege of having the cause tried in his own court. But if the lord himself was sued as party (d), which was become a very common practice (e), he paid a fine of sixty livres to the king, or to the paramount, before whom the appeal was brought. From thence arose the usage, after appeals had been generally received, of fining the lord upon the amendment of the sentence of his judge; an usage which lasted a long time, and was confirmed by the ordinance of Rouffillon, but fell at length to the ground, through its own absurdity.

In

(a) Defontaines, ch. 21. art. 33.

(b) In the year 1732.

† See the situation of things in Boutillier's time, who lived in the year 1402. *Somme Rurale*, book i. p. 19. & 20.

(c) See chap. 30.

(d) Beaumanoir, chap. 61. p. 312. & 318.

(e) *Ibid.*

In the practice of judicial combats, the person who had appealed one of the judges of false judgment, might lose (f) his cause by the combat, but could not possibly gain it. In fact, the party who had a judgment in his favour, ought not to have been deprived of it by another man's act. The appellant therefore, who had gained the battle, was obliged to fight likewise against the adverse party; not in order to know whether the judgment was good or bad (for this judgment was out of the case, being reversed by the combat), but to determine whether the demand was just or not: and it was on this new point they fought. From thence proceeds our manner of pronouncing arrests, *The court annuls the appeal, and the judgment against which the appeal was brought.* In effect, when the person who had made the appeal of false judgment, happened to be overcome, the appeal was reversed; when he proved victorious, both the judgment and the appeal were reversed: then they were obliged to proceed to a new judgment.

This is so far true, that when the cause was tried by inquests, this manner of pronouncing did not take place: witness what M. de la Roche Flavin (g) says, namely, that the chamber of inquests could not use this form at the beginning of its creation.

CHAP. XXIX.

In what manner the Proceedings at Law became Secret.

DUELS had introduced a public form of proceeding, so that both the attack and the defence were equally known. The witnesses, says Beaumanoir (h), ought to give in their testimony in open court.

Boutillier's commentator says, he had learnt of ancient practitioners, and from some old manuscript law books, that criminal

(f) Defontaines, chap. 21. art. 14.

(g) Of the parliaments of France, book i. chap. 16.

(h) Chap. 61. p. 315.

nal processes were anciently carried on in public, and in a form not very different from the public judgments of the Romans. This was owing to their not knowing how to write; a thing in those days very common. The usage of writing fixes the ideas, and preserves the secret; but when this usage is laid aside, nothing but the publicity of the proceeding is capable of fixing those ideas.

And as uncertainty might* easily arise in respect to what had been judged by vassals, or pleaded before vassals, they could therefore refresh their memory every time they held a court, by what was called proceedings on record †. In that case it was not allowed to challenge the witnesses to combat; for then there would be no end of disputes.

In process of time a secret form of proceeding was introduced. Every thing before had been public; every thing now became secret; the interrogatories, the informations, the re-examinations, the confronting of witnesses, the opinion of the public prosecutor; and this is the present practice. The first form of proceeding was suitable to the government of that time, as the new form was proper to the government since established.

Boutillier's commentator fixes the epoch of this change to the ordinance in the year 1539. I am apt to believe that this change was made insensibly, and passed from one lordship to another, in proportion as the lords renounced the ancient form of judging, and that derived from the institutions of St. Lewis was improved. In fact, Beaumanoir says (a), that witnesses were publicly heard only in cases in which it was allowed to give pledges of battle: in others, they were heard in secret, and their depositions were reduced to writing. The proceedings became therefore secret when they ceased to give the pledges of battle.

* As Beaumanoir says, chap. 39. p. 209.

† They proved by witnesses what had been already done, said, or decreed in court.

(a) Chap. 39. p. 218.

CHAP. XXX.

Of the Costs.

IN former times no one was condemned in France to the payment of costs (b) in temporal courts. The party cast was sufficiently punished by sentences of pecuniary fines to the lord and his peers. From the manner of proceeding by judicial combat it followed, that the party who was condemned and deprived of life and fortune, was punished as much as he could be; and in the other cases of the judicial combat, there were fines sometimes fixed, and sometimes dependent on the disposition of the lord, which were sufficient to make people dread the events of suits. The same may be said of causes that were not decided by combat. As the lord had the chief profits, so he was also at the chief expence, either to assemble his peers, or to enable them to proceed to judgment. Besides, as disputes were generally determined on the spot, and without that infinite multitude of writings which afterwards followed, there was no necessity of allowing costs to the parties.

The custom of appeals naturally introduced that of giving costs. Thus Defontaines (c) says, that when they appealed by written law, that is, when they followed the new laws of St. Lewis, they gave costs; but that in the usual custom, which did not permit them to appeal without falsifying the judgment, no costs were allowed. They obtained only a fine, and the possession for a year and a day of the thing contested, if the cause was remanded to the lord.

But when the number of appeals increased from the new facility of appealing *; when by the frequent usage of these appeals

(b) Defontaines in his council, chap. 22. art. 3. & 8. and Beaumanoir, chap. 33. Institutions, book 1. chap. 90.

(c) Chap. 22. art. 8.

* At present when they are so inclined to appeal, says Boutillier, Somme Rurale, book 1. tit. 3, page 16.

peals from one court to another, the parties were continually removed from the place of their residence; when the new method of proceeding multiplied and eternized the suits; when the art of eluding the very justest demands was refined; when the parties at law knew how to fly only in order to be followed; when actions proved destructive, and pleas easy; when the reasons were lost in whole volumes of writings; when the world was filled with members of the law, who were strangers both to law and justice; when knavery found advice where it found no support; then it was necessary to deter litigious people by the fear of costs. They were obliged to pay costs for the judgment, and for the means they had employed to elude it. Charles the Fair made a general ordinance on that subject (a).

CHAP. XXXI.

Of the Public Prosecutor.

AS by the Salic, Ripuarian, and other barbarous laws, crimes were punished with pecuniary fines; they had not in those days, as we have at present, a public officer who has the care of criminal prosecutions. In effect, the issue of all causes being reduced to the reparation of damages, every prosecution was in some measure civil, and might be managed by any one. On the other hand, the Roman law had popular forms for the prosecution of crimes, which were inconsistent with the office of a public prosecutor.

The custom of judicial combats was no less opposite to this idea: for who is it that would chuse to make himself every man's champion against all the world?

I find in the collection of formulas, inserted by Muratori in the laws of the Lombards, that under our princes of the second

I i 2

race

(a) In the year 1324.

race there was an advocate of the public * prosecutor. But whosoever pleases to read the entire collection of these formulas, will find there was a total difference between those officers and what we now call the public prosecutor, our attorney-generals, our king's solicitors, or our solicitors of the nobility. The former were rather agents of the public for the management of political and domestic affairs, than for the civil. In fact, we do not find in these formulas that they were intrusted with criminal prosecutions, or with causes relating to minors, to churches, or to the condition of persons.

I said that the establishment of a public prosecutor was repugnant to the usage of judicial combats. I find, notwithstanding, in one of those formulas, an advocate of the public prosecutor who had the liberty to fight. Muratori has placed it just after the constitution (a) of Henry I. for which it was made. In this constitution it is said, "That if any man kills his father, his brother, or any of his other relations, he shall lose their succession, which shall pass to the other relations, and his own shall go to the exchequer." Now it was in suing for the succession which had devolved to the exchequer, that the advocate of the public prosecutor, by whom its rights were defended, had the privilege of fighting: This case fell within the general rule.

We see in those formulas the advocate of the public prosecutor proceeding against (b) a person who had taken a robber, but had not brought him before the count; against another (c) who had raised an insurrection or tumult against the count; against another (d) who had saved a man's life whom the count had ordered to be put to death: against (e) the advocate of some churches,

* *Advocatus de parte publica.*

(a) See this constitution and this formula in the second volume of the *Historians of Italy*, page 175.

(b) Collection of Muratori, page 104, on the 88th law of Charlemagne, book i. tit. 26. §. 78.

(c) Another formula, *ib.* page 87.

(d) *Ibid.* page 104.

(e) *Ibid.* p. 95.

churches, whom the count had commanded to bring a robber before him, but had not obeyed; against (f) another who had revealed the king's secret to strangers; against (a) another who with open violence had attacked the emperor's commissary; against (b) another who had been guilty of contempt to the emperor's rescripts, and he was prosecuted either by the emperor's advocate, or by the emperor himself; against (c) another who refused to accept of the prince's coin: in fine, this advocate sued for things, which by the law were adjudged to the exchequer (d).

But in criminal causes, we never meet with the advocate of the public prosecutor; not even where duels are used; (e) not even in the case of incendiaries; (f) not even when the judge is killed (g) on his bench; not even in causes relating to the condition of persons (h), to liberty and slavery (i).

These formulas are made not only for the laws of the Lombards, but likewise for the capitularies added to them; so that we have no reason at all to doubt of their giving us the practice observed under our princes of the second race upon this subject.

As the usage of combats was become more frequent under the third race, it did not allow of any such thing as a public prosecutor. Hence Boutillier, in his *Somme Rurale*, speaking of the officers of justice, takes notice only * of the bailiffs, the peers, and serjeants.

I find in the laws † of James II. king of Majorca, a creation of the office of the king's attorney ‡ general, with the very same functions as are exercised at present by the officers of that name amongst us. It is manifest that this office was not instituted till we had changed the form of our judiciary proceedings.

CHAP.

(f) Ibid. pag. 88.

(a) Ibid. pag. 98.

(d) Ibid. pag. 137.

(g) Ibid. pag. 168.

(b) Ibid. pag. 113.

(e) Ibid. pag. 147.

(h) Ibid. pag. 134.

(c) Ibid.

(f) Ibid.

(i) Ibid. pag. 107.

* See also the Institutions, book i. chap. 1. book ii. chap. 11. & 13. and Beaumanoir chap. 21. pag. 308. concerning the manner in which prosecutions were managed in those days.

† See these laws in the lives of the saints of the month of June, tom. iii. pag. 26.

‡ Qui continue nostram sacram curiam sequi teneatur, instituatur qui facta & causas in ipsa curia promoveat at que prosequatur.

CHAP. XXXII.

In what manner the Institutions of St Lewis fell into Oblivion.

IT was the fate of the institutions, that their origin, progress and decline, were comprised within a very short period.

I shall make a few reflections upon this subject. The code we have now under the name of St Lewis's institutions, was never designed as a law for the whole kingdom, though such a design is mentioned in the preface to this code. This complement is a general code, which determines all points relating to civil affairs, to the disposal of property by will or otherwise, the dowries and advantages of women, the profits and prerogatives of fiefs, and the affairs relating to the police, &c. Now to give a general body of civil laws, at a time when each city, town or village had its customs, was attempting to subvert in one moment all the particular laws that were then in force, in every part of the kingdom. To reduce all the particular customs to a general one, would be a very inconsiderate thing, even at present when our princes find in all parts the most passive obedience. But if it be a rule that we ought not to change when the inconveniences are equal to the advantages, much less ought we to change when the advantages are small and the inconveniencies immense. Now, if we attentively consider the situation which the kingdom was in at that time, when every lord was puffed up with the notion of his sovereignty and power, we shall find that to attempt a general change of the received laws and customs, must be a thing that could never enter into the heads of those who were then in the administration.

What I have been saying proves likewise that this code of institutions was not confirmed in parliament by the barons and magistrates of the kingdom, as is mentioned in a manuscript of the town-house of Amiens, quoted by Monsieur Ducange (a).

We

(a) Preface to the Institutions.

We find in other manuscripts that this code was given by St. Lewis in the year 1270, before he set out for Tunis. But this fact is not truer than the other; for St. Lewis set out upon that expedition in 1269, as Monsieur Ducange observes: from whence he concludes, that this code might have been published in his absence. But this, I say, is impossible. How can St. Lewis be imagined to have pitched upon the time of his absence for transacting an affair which would have been the seed of troubles, and might have produced not only changes, but revolutions? An enterprize of that kind had need, more than any other, of being closely pursued, and could not be the work of a feeble regency, composed moreover of lords * whose interest it was that it should not succeed.

Thirdly, I affirm it to be very probable, that the code now extant is quite a different thing from St. Lewis's institutions. This code cites the institutions; therefore it is a work written upon the institutions, and not the institutions themselves. Besides, Beaumanoir, who frequently makes mention of St. Lewis's institutions, quotes only some particular institutions of that prince, and not this compilement. Defontaines (a), who wrote in that prince's reign, makes mention of the two first times that his institutions on judicial proceedings were put in execution, as of a thing long since elapsed. The institutions of St. Lewis were prior therefore to the compilement I am now speaking of, which in rigour, and adopting the erroneous prefaces prefixed by some ignorant persons to that work, could not have been published before the last year of St. Lewis, or even not till after his death.

What is this compilement then which goes at present under the name of St. Lewis's institutions? What is this obscure, confused,

* Matthew abbot of St. Denis, Simon of Clermont count of Nelle, and in case of death Philip bishop of Evreux, and John count of Ponthieu. We have seen above in the 30th chapter, that the count of Ponthieu opposed the execution of a new judiciary order in his lordship. This fact is related by Defontaines.

(a) See above, chap. 28.

fused, and ambiguous code, where the French law is continually mixed with the Roman, where a legislator speaks, and yet we see a civilian, where we find a complete digest of all cases and points of the civil law? To understand this thoroughly, we must transfer ourselves in imagination to those times.

St. Lewis, seeing the abuses in the jurisprudence of his time, endeavoured to give the people a dislike to it: with this view he made several regulations for the courts of his demesnes and for those of his barons. And such was his success, that Beaumanoir (a), who wrote a little after the death of that prince, informs us, that the manner of judging, established by St. Lewis, obtained in a great number of the courts of the barons.

Thus this prince attained his end, though his regulations for the courts of the lords were not designed as a general law for the kingdom, but as a model which every one might follow, and would even find an interest in following. He removed the evil by rendering them sensible of the good. When it appeared that his courts, and those of some lords, had chosen a form of proceeding more natural, more reasonable, more conformable to morality, to religion, to the public tranquillity, and to the security of person and property; this form was soon adopted, and the other rejected.

To invite when it is improper to constrain, to lead when it is improper to command, is the highest point of ability. Reason has a natural, nay, it has even a tyrannical sway; it meets with resistance, but this very resistance forms its triumph; for after a short struggle it forces an entire submission.

St. Lewis, in order to give a distaste of the French jurisprudence, caused the books of the Roman law to be translated, by which means they were made known to the lawyers of those times. Defontaines, who is the oldest * law writer we have, made great use of those Roman laws. His work is in some measure

(a) Chap. 61. page 309.

* He says of himself in his prologue, *Nus lui en prit onques mais cette chose dont j'ai.*

measure a result of the ancient French jurisprudence, of the laws or institutions of St. Lewis, and of the Roman law. Beaumanoir made very little use of the latter ; but he reconciled the ancient French laws with the regulations of St. Lewis.

I have a notion therefore that the law book, known by the name of the Institutions, was compiled by some bailiffs, with the same design as that of the authors of those two works, and especially of Defontaines. The title of this work mentions, that it is wrote according to the usage of Paris, of Orleans, and of the court of barony ; and the preamble says, that it treats of the usages of the whole kingdom, and of Anjou, and of the court of barony. It is plain, that this work was made for Paris, Orleans, and Anjou, as the works of Beaumanoir and Defontaines were made for the counties of Clermont and of Vermandois ; and as it appears from Beaumanoir, that divers laws of St. Lewis had been received in the courts of barony, the compiler was in the right to say, that his work related also to those courts.

It is manifest, that the person who composed this work compiled the customs of the country, together with the laws and institutions of St. Lewis. This is a very valuable work, because it contains the ancient customs of Anjou, the institutions of St. Lewis as they were then in use ; and, in fine, the whole practice of the ancient French law.

Nothing can be so vague as the title and prologue to those institutions, which must certainly have been foisted in by some ignorant hand. At first, they are the usages of Paris, Orleans, and of the court of barony ; afterwards they are the usages of all the temporal courts of the kingdom, and of the provostship of France ; at length they are the usages of the whole kingdom, and of Anjou, and of the court of barony.

I fancy that St. Lewis caused this work to be undertaken, and that it was finished by his successor : One or both of those princes ordered some customs of their demesnes to be reduced into writing ; and because these customs were there confounded with the laws lately made by St. Lewis, the work was called St.

Lewis's Institutions. In fact, so great a name must naturally have given it a sanction. All this was published under a general form ; and the whole affair was most prudently managed. By reducing them into writing, they became more known ; and by giving them a general form, their use was more extended. The laws of the kingdom were at that time nothing else but the customs of each place retained in the memories of old men. In this general insufficiency, every one might find in the new code what was wanting in those laws ; this was a source from whence they might all draw. The difference between this work and those of Defontaines and Beaumanoir, is its speaking in imperative terms as a legislator ; and this might be right, as it was a mixture of written customs and laws.

There was an intrinsic defect in this compilement ; it formed an amphibious code, where the French and Roman laws were mixed ; and where things were joined that were no way relative, but often contradictory to each other. It is impossible to form a good system of laws from two contrary digests.

I am not ignorant that the French courts of vassals or peers, the judgments without power of appealing to another tribunal, the manner of pronouncing sentence by these words, *I condemn, I absolve* (a), had some conformity to the popular judgments of the Romans. But they made very little use of that ancient jurisprudence ; they rather chose that which was afterwards introduced by the Emperors, and employed it through the whole compilement, in order to regulate, limit, correct and extend the French jurisprudence.

St Lewis, as we have already observed, had caused the works of Justinian to be translated, in order to give credit to the Roman law. It was soon taught in the schools, for they liked it better in its natural form, than in the disfigured shape in which it appeared in the new code.

Besides,

(a) Institutions, book ii. chap. 15.

Besides, this compilement made decrees in respect to several things that no longer existed, such as the judgment of peers, judicial combats, private wars, the slavery of the Jews, the crusades, and bondmen. And as the following ages were remarkable for changes, the more changes they made, the more they had occasion to make ; so that this code was always less fitted to the actual state of things, especially as the local dispositions contained therein were also changed.

Farther, the judiciary forms introduced by St Lewis fell into disuse. This prince had not so much in view the thing itself, that is the best manner of judging, as the best manner of supplying the ancient practice of judging. The principal intent was to give a disrelish of the ancient jurisprudence, and the next to form a new one. But when the inconveniencies of the latter appeared, another soon succeeded.

The institutions of St Lewis did not therefore so much change the French jurisprudence, as they afforded the means of changing it ; they opened new tribunals, or rather ways to come at them. And when once the access was easy to that which was vested with the general authority, the judgments which before constituted only the usages of a particular lordship, formed an universal digest. By means of the institutions they had obtained general decisions, which were entirely wanting in the kingdom : when the building was finished, they let the scaffold fall to the ground.

Thus the institutions produced effects which could hardly be expected from a master-piece of legislation. To prepare great changes, sometimes whole ages are requisite ; the events ripen, and then the revolutions succeed.

The parliament judged in the last resort of almost all the affairs of the kingdom. Before (a), it took cognizance only of disputes between the dukes, counts, barons, bishops, abbots, or

K k 2

between

(a) See Du Tillet on the court of peers. See also Laroche Flavin, book i. chap. 3. Budæus, and Paulus Emilius.

between the king and his vassals *, rather in the relation they had to the political, than to the civil order. They were soon obliged to render it permanent, whereas it used to be held only a few times in a year; and, in fine, a great number were created, in order to be sufficient for the decision of all manner of causes.

No sooner was the parliament become a fixed body, than they began to compile its decrees. John de Monluc, under the reign of Philip the Fair, made a collection which at present is known by the name of the *Olim* registers.

CHAP. XXXIII.

In what manner the judiciary Forms were borrowed from the Decretals.

BUT how comes it, some will say, that when the institutions were laid aside, the judicial forms of the canon law should be preferred to those of the Roman? It was because they had constantly before their eyes the ecclesiastic courts, which followed the forms of the canon law, and they knew no court that followed those of the Roman law. Besides, the limits of the spiritual and temporal jurisdictions were at that time very little known: there were (a) people * who sued indifferently, and causes that were tried indifferently, in either court. It seems (b) as if the temporal jurisdiction reserved no other cases exclusively to itself than the judgment of feudal matters †, and of crimes committed by laymen in cases not relating to religion. For (c) if

* Other causes were decided by the ordinary tribunals.

(a) Beaumanoir, chap. 11. page 458.

* Widows, croises, &c. Beaumanoir, chap. 11. page 58.

(b) See the whole 11th chap.

† The spiritual courts had even laid hold of these, under the pretext of the oath, as may be seen by the famous Concordat between Philip Augustus, the clergy, and the barons, which is found in the ordinances of Lauriere.

(c) Beaumanoir, chap. 11. page 60.

if on the account of conventions and contracts, they had occasion to sue in a temporal court, the parties might of their own accord proceed before the spiritual courts; and as the latter had not a power to oblige the temporal court to execute the sentence, they made people obey by means of excommunications. Under those circumstances, when they wanted to change the course of proceedings in the temporal court, they took that of the spiritual courts, because they knew it; and did not meddle with that of the Roman law, because they were strangers to it: for in point of practice, people know only what is practised.

CHAP. XXXIV.

Flux and Reflux of the Ecclesiastical and Temporal Jurisdiction.

THE civil power being in the hand of an infinite number of lords, it was an easy matter for the ecclesiastic jurisdiction to gain every day a greater extent. But as the ecclesiastic courts weakened those of the lords, and contributed thereby to give strength to the royal jurisdiction, the latter gradually checked the jurisdiction of the clergy. The parliament, which in its form of proceedings had adopted whatever was good and useful in the spiritual courts, soon perceived nothing else but the abuses which had crept into those courts; and as the royal jurisdiction gained ground every day, it grew every day more capable of correcting those abuses. In fact, they were intolerable; and without enumerating them, I shall refer * the reader to Beaumanoir, to Boutillier, and to the ordinances of our kings. I shall mention only two, in which the public interest was more directly concerned. These abuses we know by the decrees that reformed

* See Boutillier, *Somme Rurale*, tit. 9. what persons are incapable of suing in a temporal court; and Beaumanoir, chap. 11. page 56. and the regulations of Philip Augustus upon this subject; as also the regulations between Philip Augustus, the clergy, and the barons,

reformed them : they had been introduced in the times of the darkest ignorance, and upon the breaking out of the first gleam of light, they vanished. By the silence of the clergy it may be presumed, that they forwarded this reformation : which, considering the nature of the human mind, deserves commendation. Every man that died without bequeathing a part of his estate to the church, which was called dying *without confession*, was deprived of the sacrament, and of christian burial. If he died without making a will, his relations were obliged to prevail upon the bishop, that he would jointly with them name proper arbiters, to determine what sum the deceased ought to have given, in case he had made a will. People could not lie together the first night of their nuptials, nor even the two following nights, without having previously purchased leave : these indeed were the three best nights to chuse ; for as to the others they were not worth much. All this was redressed by the parliament : we find in the (a) glossary of the French law, by Ragau, the arrest which it published (b) against the bishop of Amiens.

I return to the beginning of my chapter. Whenever we observe, in any age or government, the different bodies of the state endeavouring to increase their authority, and to take particular advantages of each other, we should be often mistaken were we to consider their encroachments as an evident mark of their corruption. Through a fatality inseparable from human nature, moderation in great men is very rare : and as it is always much easier to push on force in the direction in which it moves, than to stop its movement, so in the superior class of the people it is less difficult, perhaps, to find men extremely virtuous, than extremely prudent.

The soul feels such an exquisite pleasure in domineering, even those who are lovers of virtue are so excessively fond of themselves,

(a) In the word Testamentary Executors, (b) The 19th of March, 1409,

ſelves, that there is no man ſo happy, as not to have ſtill reaſon to miſtruſt his honeſt intentions : and indeed our actions depend on ſo many things, that it is infinitely more eaſy to do good, than to do it well.

CHAP. XXXV.

The revival of the Roman Law, and the reſult thereof. Change in the Tribunals.

UPON the diſcovery of Juſtinian's digeſt, towards the year 1137, the Roman law ſeemed to riſe out of its aſhes. Schools were then eſtabliſhed in Italy, where it was publicly taught : they had already the Juſtinian code, and the *Novel* I mentioned before, that this code had been ſo favourably received in that country, as to eclipse the law of the Lombards.

The Italian docters brought the law of Juſtinian into France, where they had only * the Theodoſian code ; becauſe Juſtinian's laws were not made † till after the ſettlement of the Barbarians in Gaul. This law met with ſome oppoſition : but it ſtood its ground, notwithstanding the excommunications of the popes, who ſupported (a) their own canons. St Lewis endeavoured to bring it into repute by the tranſlations made by his orders of Juſtinian's works, which are ſtill in manuſcript in our libraries ; and I have already obſerved, that they made great uſe of them in compiling the inſtitutions. Philip the Fair ‡ ordered the laws of Juſtinian to be taught only as written reaſon, in thoſe provinces of France that were governed by cuſtoms ; and

* In Italy they followed Juſtinian's code : hence Pope John VIII. in his conſtitution publiſhed after the ſynod of Troyes, makes mention of this code, not becauſe it was known in France, but becauſe he knew it himſelf, and his conſtitution was general,

† This Emperor's code was publiſhed towards the year 530.

(a) Decretals, book v. tit. de privilegiis, capite ſuper ſpecula.

‡ By a charter in the year 1312, in favour of the univerſity of Orleans, quoted by Du Tillot.

and they were adopted as a law in those provinces where the Roman law had been received.

I have already taken notice, that the manner of proceeding by judicial combat, required very little knowledge in the judges: disputes were decided according to the usage of each place, and pursuant to a few simple customs received by tradition. In Beaumanoir's time (b) there were two different ways of administering justice; in some places they tried by peers †, in others by bailiffs; in following the first way, the peers gave judgment ‡ according to the usage of their court; in the second it was the *prodes homines*, or old men, who pointed out the same usage to the bailiff. This whole proceeding required neither learning, capacity, nor study. But when the dark code of the institutions made its appearance, when the Roman law was translated, and taught in public schools, when a certain art of procedure and jurisprudence began to be formed, when practitioners and civilians were seen to rise; the peers and the *prodes homines* were no longer capable of judging: the peers began to withdraw from the lords tribunals; and the lords were very little inclined to assemble them; especially as the new form of trial, instead of being a pompous action agreeable to the nobility, and interesting to a warlike people, was become a course of pleading, which they neither understood, nor cared to learn. The custom of trying by peers began to * be less used; that of trying by bailiffs to be more so: the
bailiffs

(b) Customs of Beauvoisis, chap. 1. of the office of bailiffs.

† Among the common people the burghers were tried by burghers, as the feudatory tenants were tried by one another. See la Thaumassiere, chap. 19.

‡ Thus all requests began with these words; My Lord Judge, it is customary that in your court, &c. as appears from the formula quoted by Boutillier, *Somme Rurale*, book iv. tit. 21.

* The change was insensible; we meet with trials by peers even in Boutillier's time, who lived in the year 1402, which is the date of his will: but nothing but feudal matters were tried any longer by the peers. Boutillier, book i. tit. 1, p. 16.

bailiffs did not give judgment || themselves, they summed up the evidence, and pronounced the judgment of the *prodes homines*; but the latter being no longer capable of judging, the bailiffs themselves gave judgment.

This was effected so much the easier, as they had before their eyes the practice of the ecclesiastic courts; the canon and new civil law both concurred alike to abolish the peers.

Thus fell the usage hitherto constantly observed in the French monarchy, that judgment should not be pronounced by a single person, as may be seen in the Salic laws, the capitularies, and in the first (a) law-writers under the third race. The contrary abuse, which obtains only in local jurisdictions, has been moderated, and in some measure redressed, by introducing in many places a judge's deputy, whom he consults, and who represents the ancient *prodes homines*; by the obligation the judge is under of taking two graduates, in cases that deserve a corporal punishment; and, in fine, it is become of no manner of effect by the extreme facility of appeals.

Thus there was no law to inhibit the lords from holding their courts themselves; no law to abolish the functions of their peers; no law to ordain the creation of bailiffs; no law to give them the power of judging. All this was effected insensibly, and by the very necessity of the thing. The knowledge of the Roman law, the arrests of the courts, the new digest of the customs, required a study of which the nobility and illiterate people were incapable.

VOL. II.

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|| As appears by the formula of the letters which their lord used to give them, quoted by Boutillier, *Somme Rurale*, book 1. tit. 14. which is proved likewise by Beaumanoir, custom of Beauvoisis, chap. 1. of the bailiffs; they only directed the proceedings. "The bailiff is obliged in the presence of the peers to take down the words of those who plead, and to ask the parties whether they were willing to have judgment given according to the reasons alledged; and if they say, yes, my lord; the bailiff ought to oblige the peers to give judgment." See also the institutions of St. Lewis, book 1. chap. 105. and book 2, chap. 15.

(a) Beaumanoir, chap. 67. page 336. & chap. 61. p. 315. & 316. The institutions, book 2. chap. 15.

The only (b) ordinance we have upon this subject, is that which obliged the lords to chuse their bailiffs from among the laity. It is a mistake to look upon this as the law of their creation ; for it says no such thing. Besides, it fixes what it prescribes by the reasons it gives : *To the end that the bailiffs may be punished * for their prevarications, it is necessary they be taken from the order of the laity.* The immunities of the clergy in those days are very well known.

We must not imagine that the privileges which the nobility formerly enjoyed, and of which they are now divested, were taken from them as usurpations ; no, many of those privileges were lost through neglect, and others were given up, because, as various changes had been introduced in the course of so many ages, they were inconsistent with those changes.

CHAP. XXXVI.

Of the Proof by Witnesses.

THE judges, who had no other rule to go by than the usages, inquired very often by witnesses into every cause that was brought before them.

The usage of judicial combats beginning to decline, they made their inquests in writing. But a verbal proof committed to writing, is never more than a verbal proof ; so that this only increased the expences of law proceedings. Regulations were then made, which rendered most of those inquests † useless ; public registers were established, which ascertained most facts, as nobility, age, legitimacy, and marriage. Writing is a witness very hard to corrupt ; the customs were therefore reduced
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(b) It was published in the year 1287.

* Ut si ibi delinquant, superiores sui possint animadvertere in eosdem.

† See in what manner age and parentage were proved, Institutions, book i, chap. 71, and 72,

to writing. All this is very reasonable ; it is much easier to go and see in the baptismal register, whether Peter is the son of Paul, than to prove this fact by a tedious inquest. When there are a great number of usages in a country, it is much easier to write them all down in a code, than to oblige individuals to prove every usage. At length the famous ordinance was made, which prohibited the admitting of the proof by witnesses for a debt exceeding an hundred livres, except there was the beginning of a proof in writing.

CHAP. XXXVII.

Of the Customs of France.

FRANCE, as we have already observed, was governed by unwritten customs ; and the particular usages of each lordship constituted the civil law. Every lordship had its civil law, according to Beaumanoir (a), and so particular a law, that this author, who is looked upon as a luminary, and a very great luminary, of those times, says he does not believe that throughout the whole kingdom there were two lordships entirely governed by the same law.

This prodigious diversity had a first and second origin. With regard to the first, the reader may recollect what has been already said concerning it in the (b) chapter of local customs ; and as to the second we meet with it in the different events of legal duels ; it being natural that a continual series of fortuitous cases must have been productive of new usages.

These customs were preserved in the memory of old men ; but insensibly laws or written customs were formed.

1. At the commencement (c) of the third race, the kings gave not only particular charters, but likewise general ones, in the

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manner

(a) Prologue to the custom of Beauvoisis.

(b) Chap. 10.

(c) See the collection of ordinances, by Lauriere.

manner above explained ; such are the institutions of Philip Augustus, and those made by St. Lewis. In like manner the great vassals, in concurrence with the lords who held under them, granted certain charters or establishments, according to particular circumstances, at the assizes of their duchies or counties : such were the assize of Godfrey count of Britany, on the division of the nobles ; the customs of Normandy, granted by duke Ralph ; the customs of Champagne, given by king Theobald ; the laws of Simon count of Montfort, and others. This produced some written laws, and even more general ones than those they had before.

2. At the beginning of the third race, almost all the common people were bond-men ; but there were several reasons which determined afterwards the kings and lords to enfranchise them.

The lords by enfranchising their bond-men gave them property ; it was necessary therefore to give them civil laws, in order to regulate the disposal of that property. The lords, by enfranchising their bond-men, deprived themselves of their property ; there was a necessity therefore of regulating the rights which they reserved to themselves, as an equivalent for that property. Both these things were regulated by the charters of enfranchisement ; those charters formed a part of our customs, and this part was reduced to writing.

3. Under the reign of St. Lewis, and of the succeeding princes, some able practitioners, such as Defontaines, Beaumanoir, and others, committed the customs of their bailiwicks to writing. Their design was rather to give the course of judicial proceedings, than the usages of their time in respect to the disposal of property. But the whole is there ; and tho' these particular authors have no authority but what they derive from the truth and notoriety of the things they speak of, yet there is no manner of doubt but they contributed greatly to the restoration of our ancient French law. Such was in those days our common law.

We

We are come now to the grand epocha. Charles VII. and his successors caused the different local customs throughout the kingdom to be reduced to writing, and prescribed set forms to be observed at their digesting. Now as this digesting was made through all the provinces, and as people came from each lordship to declare in the general assembly of the province the written or unwritten usages of each place, endeavours were used to render the customs more general, as much as possible, without injuring the interests of individuals, which were carefully * preserved. Thus our customs assumed three characters; they were committed to writing, they were made more general, and they received the stamp of the royal authority.

Many of these customs having been digested anew, several changes were made, either in suppressing whatever was incompatible with the actual practice of the law, or in adding several things drawn from this practice.

Though the common law is considered amongst us as in some measure opposite to the Roman, insomuch that these two laws divide the different territories; it is notwithstanding true that several regulations of the Roman law entered into our customs, especially when they made the new digests at a period of time not very distant from ours, when this law was the principal study of all those who were designed for civil employments; at a time when it was not usual for people to boast of not knowing what it was their duty to know, and of knowing what they ought not to know; at a time when a quickness of understanding was made more subservient towards learning than pretending to a profession, and when a continual pursuit of amusements was not even the characteristic of women.

What has been hitherto said of the formation of our civil laws, seems to lead me naturally to give also the theory of our political laws; but this would be too great a work. I am like that.

* This was observed at the digesting of the customs of Berry and of Paris. See la Thaumassiere, chap. 3.

that antiquarian who set out from his own country, arrived in Egypt, cast an eye on the pyramids, and returned home.

BOOK XXIX.

Of the Manner of Composing Laws.

CHAP. I.

Of the Spirit of the Legislator.

I SAY it, and methinks I have undertaken this work with no other view than to prove it, the spirit of moderation ought to be that of the legislator; political, like moral evil, lying always between two extremes. Let us produce an example.

The set forms of justice are necessary to liberty; but the number of them might be so great as to be contrary to the end of the very laws that established them; processes would have no end; property would be uncertain; the goods of one of the parties would be adjudged to the other without examining, or they would both be ruined by examining too much.

The citizens would lose their liberty and security; the accusers would no longer have any means to convict, nor the accused to justify themselves.

Cecilius, in Aulus Gellius (a), speaking of the law of the twelve tables, which permitted the creditor to cut the insolvent debtor

(a) Book 20, chap. 1.

debtor into pieces, justifies it even by its cruelty, which * hindered people from borrowing beyond their abilities. Shall then the cruellest laws be the best? Shall goodness consist in excess, and all the relations of things be destroyed?

CHAP. II.

That the Laws which seem to deviate from the Views of the Legislator, are frequently agreeable to them.

THE law of Solon, which declared those persons infamous who espoused no side in an insurrection, seemed very extraordinary; but we ought to consider the circumstances in which Greece was at that time. It was divided into very small states; and there was reason to apprehend, lest, in a republic, torn by intestine divisions, the soberest part should keep retired, and things by this means should be carried to extremity.

In the seditions raised in those petty states, the bulk of the citizens either made or engaged in the quarrel. In our large monarchies, parties are formed by a few, and the people chuse to live quiet. In the latter case it is natural to call back the seditious to the bulk of the citizens, and not these to the seditious: in the other, it is necessary to oblige the small number of prudent people to enter among the seditious: it is thus the fermentation of one liquor may be stopt by a single drop of another.

CHAP.

* Cecilius says, that he never saw nor read of an instance, in which this punishment had been inflicted; but it is likely that no such punishment was ever established; the opinion of some civilians, that the law of the twelve tables meant only the division of the money arising from the sale of the debtor, seems very probable.

CHAP. III.

Of the Laws that are contrary to the Views of the Legislator.

THERE are laws so little understood by the legislator, as to be contrary to the very end he proposed. Those who made this regulation among the French, that when one of the two competitors died, the benefice should devolve to the survivor, had in view without doubt the extinction of quarrels: but the very reverse falls out; we see the clergy at variance every day, and like English mastiffs worrying one another to death.

The law I am going to speak of, is to be found in this oath preserved by Æschines *: “ I swear that I will never destroy
“ a town of the Amphictyons, and that I will not divert the
“ course of its running waters; if any nation shall presume to
“ do such a thing, I will declare war against them, and will
“ destroy their towns.” The last article of this law, which seems to confirm the first, is really contrary to it. Amphictyon is willing that the Greek towns should never be destroyed, and yet his law paves the way for the destruction of these towns. In order to establish a proper law of nations among the Greeks, they ought to have been accustomed early to think it a barbarous thing to destroy a Greek town; consequently they ought not even to destroy the destroyers. Amphictyon’s law was just; but it was not prudent; this appears even from the abuse made of it. Did not Philip assume the power of destroying towns, under the pretence of their having infringed the laws of the Greeks? Amphictyon might have inflicted other punishments; he might have ordained, for example, that a certain number of the magistrates of the destroying town, or of the chiefs of the infringing army should be punished with death; that the destroying
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* De falsa legatione.

nation should cease for a while to enjoy the privileges of the Greeks; that they should pay a fine till the town was rebuilt. The law ought above all things to aim at the reparation of damages.

CHAP. IV.

That the Laws which appear the same have not always the same Effect.

CÆSAR made a law (a) to prohibit people from keeping above sixty sesterces in their houses. This law was considered at Rome as extremely proper for reconciling the debtors to their creditors; because, by obliging the rich to lend to the poor, they enabled the latter to pay their debts. A law of the same nature made in France at the time of the system, proved extremely fatal; because it was enacted under a most frightful circumstance. After depriving people of all possible means of laying out their money, they stripped them even of the last resource of keeping it at home, which was the same as taking it from them by open violence: Cæsar's law was designed to make the money circulate; the French minister's design was to draw all the money into one hand. The former gave either lands or mortgages on private people for the money; the latter proposed, in lieu of money, nothing but effects which were of no value, and could have none by their very nature, because the law compelled people to accept of them.

CHAP. V.

Necessity of composing Laws in a proper manner.

THE law of ostracism was established at Athens, at Argos (b), and at Syracuse. At Syracuse it was productive of a thousand
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(b) Dio lib. 41.

(a) Aristot. Rep. lib. v. chap. 3.

and mischiefs, because it was imprudently enacted. The principal citizens banished one another by holding the leaf of a fig-tree (b) in their hands; so that those who had any kind of merit withdrew from public affairs. At Athens, where the legislator was sensible of the proper extent and limits of his law, ostracism proved an admirable thing: they never condemned more than one person at a time; and such a number of suffrages were requisite for passing this sentence, that it was extremely difficult for them to banish a person whose absence was not necessary to the state.

The power of banishing was exercised only every fifth year: in fact, as the ostracism was designed against none but great personages who threatened the state with danger, it ought not to be the transaction of every day.

CHAP. VI.

That Laws which appear the same, were not always made through the same Motive.

IN France they have received most of the Roman laws on substitutions, but through quite a different motive from the Romans. Among the latter, the inheritance was accompanied with certain * sacrifices, which were to be performed by the inheritor, and were regulated by the pontifical law; hence it was, that they reckoned it a dishonour to die without heirs, that they made slaves their heirs, and that they devised substitutions. Of this we have a very strong proof in the vulgar substitution, which was the first invented, and took place only when the heir appointed did not accept of the inheritance. Its view was not to perpetuate the estate in a family of the same name, but to find some body that would accept of it.

CHAP.

(b) Plutarch, life of Dionysius.

* When the inheritance was too much incumbered, they eluded the pontifical law by certain sales, from whence comes the words, sine sacris hæreditas.

CHAP. VII.

That the Greek and Roman Laws punished Suicide, but not through the same Motive.

A MAN, says Plato (a), who has killed one nearly related to him, that is himself, not by an order of the magistrate, nor to avoid ignominy, but through faint-heartedness, shall be punished. The Roman law punished this action when it was not committed through faint-heartedness, through weariness of life, through impatience in pain, but through a criminal despair. The Roman law acquitted where the Greek condemned, and condemned where the other acquitted.

Plato's law was formed upon the Lacedæmonian institutions, where the orders of the magistrate were absolute, where shame was the greatest of miseries, and faint-heartedness the greatest of crimes. The Romans had no longer those fine ideas; theirs was only a fiscal law.

During the time of the republic, there was no law at Rome against suicides; this action is always considered by their historians in a favourable light, and we never meet with any punishment inflicted upon those who committed it.

Under the first emperors, the great families of Rome were continually destroyed by criminal prosecutions. The custom was then introduced of preventing judgment by a voluntary death. In this they found a great advantage: they had * an honourable interment, and their wills were executed; because there was no law against suicides. But when the emperors became as avaricious as cruel, they deprived those who destroyed themselves of the means of preserving their estates, by rendering

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(a) Book 9. of laws.

* Eorum qui de se statuebant humabantur corpora, manebunt testamenta, pretium festinandi. Tacit.

it criminal for a person to make away with himself through a criminal remorse.

What I have been saying of the motive of the emperors, is so true, that they consented * that the estates of suicides should not be confiscated, when the crime for which they killed themselves was not punished with confiscation.

CHAP. VIII.

That Laws which seem contrary, proceed sometimes from the same Spirit.

IN our times we give summons to people in their own houses; but this was not permitted (a) among the Romans.

A summons was a (b) violent action, and a kind of warrant for seizing the † body; hence it was no more allowed to summon a person in his own house, than it is now allowed to arrest a person in his own house for debt.

Both the Roman (c) and our laws admit of this principle alike, that every man ought to have his own house for an asylum, where he should suffer no violence.

CHAP. IX.

How we are to judge of the difference of Laws.

IN France, the punishment against false witnesses is capital; in England it is not. Now, to be able to judge which of these two laws is best, we must add that in France the rack is used against

* Rescript of the Emperor Pius in the 3d law, § 1. & 2. ff. de bonis eorum qui ante sententiam sibi consciverunt.

(a) Leg. 18. ff. de in jus vocando.

(b) See the law of the twelve tables.

† Rapit in jus, Horace, satire 9. hence they could not summon those to whom a particular respect was due.

(c) See the law 18. ff. de in jus vocando.

against criminals, but not in England; that in France the accused is not allowed to produce his witnesses; and that they very seldom admit of what is called justifying facts; in England they allow of witnesses on both sides. These three French laws form a close and well connected system; and so do the three English laws. The law of England, which does not allow of the racking of criminals, has but very little hopes to draw from the accused a confession of his crime; for this reason it invites witnesses from all parts, and does not venture to discourage them by the fear of a capital punishment. The French law, which has one resource more, is not afraid of intimidating the witnesses; on the contrary, reason requires they should be intimidated; it listens only to the witnesses on one side*, which are those produced by the attorney-general, and the fate of the accused depends entirely on their testimony. But in England they admit of witnesses on both sides, and the affair is discussed in some measure between them; consequently false witness is there less dangerous, the accused having a remedy against the false witness, which he has not in France. Wherefore, to determine which of those laws are most agreeable to reason, we must not consider them singly, but compare the whole together.

CHAP. X.

That Laws which appear the same, are sometimes really different.

THE Greek and Roman laws inflicted the same (a) punishment on the receiver as on the thief: the French law does the same. The former acted rationally, but the latter does not. Among

* By the ancient French laws, witnesses were heard on both sides; hence we find in the institutions of St Lewis, book i. chap. 1, that there was only a pecuniary punishment against false witnesses.

(a) Leg. 1. ff. de receptatoribus.

Among the Greeks and Romans, the thief was condemned to a pecuniary punishment, which ought also to be inflicted on the receiver : for every man that contributes in what shape soever to a damage, is obliged to repair it. But as the punishment of theft is capital with us, the receiver cannot be punished like the thief, without carrying things to excess. A receiver may act innocently on a thousand occasions ; the thief is always culpable ; one hinders the conviction of a crime, the other commits it ; in one the whole is passive, the other is active ; the thief must surmount more obstacles, and his soul must be more hardened against the laws.

The civilians have gone further ; they look upon the receiver as more odious than (a) the thief ; for were it not for the receiver, the theft, say they, could not be long concealed. But this again might be right, when there was only a pecuniary punishment ; the affair in question was a damage done, and the receiver was generally better able to repair it : but when the punishment became capital, they ought to have been directed by other principles.

CHAP. XI.

That we must not separate the Laws from the end for which they were made. Of the Roman Laws on Theft.

WHEN a thief was caught with the stolen thing before he had carried it to the place where he designed to hide it, this was called by the Romans an open theft ; when he was not detected till some time afterwards, it was a private theft.

The law of the twelve tables ordained, that an open thief should be whipt with rods, and condemned to slavery, if he had attained

(a) Ibid.

attained the age of puberty ; or only whipt if he was not of ripe age ; but as for the private thief, he was only condemned to a recompence of double the value of what he had stolen.

When the Porcian law abolished the custom of whipping the citizens with rods, and of reducing them to slavery, the open thief was condemned to * a recompence of four-fold, and they still condemned the private thief to a recompence of double.

It seems very odd, that these laws should make such a difference in the quality of those two crimes, and in the punishments they inflicted. - In fact, whether the thief was detected either before or after he had carried the stolen goods to the place intended, this was a circumstance which did not alter the nature of the crime. I do not at all question but the whole theory of the Roman laws in relation to theft was borrowed from the Lacedæmonian institutions. Lycurgus, with a view of rendering the citizens dexterous and cunning, ordained that children should be practised in thieving, and that those who were caught in the fact should be severely whipt : this occasioned among the Greeks, and afterwards among the Romans, a great difference between an open and a private theft *.

Among the Romans, a slave who had been guilty of stealing was thrown from the Tarpeian rock. Here the Lacedæmonian institutions were out of the question ; the laws of Lycurgus in relation to theft were not made for slaves ; to deviate from them in this respect was in reality conforming to them.

At Rome, when a person of unripe age happened to be caught in the fact, the prætor ordered them to be whipt with rods according to his pleasure, as was practised at Sparta. All this had a remoter origin. The Lacedæmonians had derived these usages from the Cretans ; and Plato (a), who wants to prove that

* See what Favorinus says in Aulus Gellius, book 20. chap. 1.

* Compare what Plutarch says in the life of Lycurgus with the laws of the digest, title de furtis ; and the institutes, book 4. tit. 1, sec. 2. and 3.

(a) Of laws, book 1.

that the Cretan institutions were designed for war, cites the following, namely, the faculty of bearing pain in private combats, and in punishments inflicted for open thefts.

As the civil laws depend on the political institutions, because they are made for the same society; whenever there is a design of adopting the civil law of another nation, it would be proper to examine before-hand, whether they have both the same institutions and the same political law.

Thus when the Cretan laws on theft were adopted by the Lacedæmonians, as their constitution and government were adopted at the same time, these laws were equally reasonable in both nations. But when they were carried from Lacedæmon to Rome, as they did not find there the same constitution, they were always thought strange, and had no manner of connection with the other civil laws of the Romans.

CHAP. XII.

That we must not separate the Laws from the circumstances in which they were made.

IT was decreed by a law at Athens, that when the city was besieged, all the useless people should be put to death*. This was an abominable political law, in consequence of an abominable law of nations. Among the Greeks the inhabitants of a town taken, lost their civil liberty, and were sold as slaves. The taking of a town implied its entire destruction: which is the source not only of those obstinate defences, and of those unnatural actions, but likewise of those shocking laws which they sometimes enacted.

The

* Inutilis ætas occidatur, Syrian in Hermog.

The Roman laws † ordained that physicians should be punished for neglect or unskilfulness. In those cases, if the physician was a person of any fortune or rank, he was only condemned to *deportation*; but if he was of a low condition, he was put to death. By our laws it is otherwise. The Roman laws were not made under the same circumstances as ours: at Rome every ignorant pretender intermeddled with physic; but amongst us, physicians are obliged to go through a regular course of study, and to take their degrees; for which reason they are supposed to understand their art.

CHAP. XIII.

That sometimes it is proper the Law should amend itself.

THE law of the twelve tables ‡ allowed people to kill a night-thief as well as a day-thief, if upon being pursued he attempted to make a defence; but it required that the person who killed the thief ||, should cry out and call his fellow-citizens; this is what those laws, which permit people to do justice to themselves, ought always to require. It is the cry of innocence, which in the very moment of the action, calls in witnesses, and appeals to judges. The people ought to take cognizance of the action, and at the very instant of its being done; an instant when every thing speaks, the air, the countenance, the passions, silence; and when every word either condemns or absolves. A law which may become so contrary to the security and liberty of the citizens, ought to be executed in their presence.

VOL. II.

N n

CHAP.

† The Cornelian law de Sicariis, institut. lib. 4. tit. 3. de lege Aquilia § 7.

‡ See the 4th law ff. ad leg. Aquil.

|| Ibidem, see the decree of Tassillon added to the law of the Bavarians de popularib. legib. art. 4.

CHAP. XIV.

Things to be observed in the composing of Laws.

THOSE who have a genius sufficient to enable them to give laws to their own, or to another nation, ought to be particularly attentive to the manner of forming them.

The style ought to be concise. The laws of the twelve tables are a model of conciseness; the very children * used to learn them by heart. Justinian's *Novels* were so very diffuse, that they were obliged to abridge them †.

The style should also be plain and simple; a direct expression being always better understood than an indirect one. There is no majesty at all in the laws of the lower empire: Princes are made to speak like rhetoricians. When the style of laws is tumid, they are looked upon only as a work of parade and ostentation.

It is an essential article, that the words of the laws should excite in every body the same ideas. Cardinal Richelieu ‡ agreed, that a minister might be accused before the king; but he would have the accuser punished, if the facts he proved were not matters of moment. This was enough to hinder people from telling any truth whatsoever against the minister; because a matter of moment is entirely relative, and what may be of moment to one, is not so to another.

The law of Honorius punished with death any person that purchased a freed-man as a slave, or that § gave him molestation. He should not have made use of so vague an expression; the molestation given to a man depends entirely on the degree of his sensibility.

When

* Ut carmen necessarium. Cicero de legib. lib. ii.

† It is the work of Irnerius.

‡ Political Testament.

§ Aut qualibet manumissione donatum inquietate voluerit. Appendix to the Theodosian code in the first volume of Father Simond's works, p. 737.

When the law wants to fix a set rate upon things, it should avoid as much as possible the valuing it in money. The value of money changes from a thousand causes, and the same denomination continues without the same thing. Every one knows the story of that impudent (a) fellow at Rome, who used to give those he met a box on the ear, and afterwards tendered them the five and twenty pence of the law of the twelve tables.

When a law has once fixed the ideas of things, it should never return to vague expressions. In the criminal ordinance of Lewis XIV. † after an exact enumeration of the causes in which the king is immediately concerned, follow these words, *and those which in all times have been subject to the determination of the king's judges*, which renders the thing again arbitrary, after it had been fixed.

Charles VII. ‡ says, he has been informed that the parties appeal three, four, and six months after judgment, contrary to the custom of the kingdom in the country governed by custom: he therefore ordains that they shall appeal forthwith, unless there happens to be some fraud or deceit in the attorney ||, or unless there be a great or evident cause to sue the appeal. The end of this law destroys the beginning, and it destroys it so effectually, that they used afterwards to appeal during the space of thirty years **.

The law of the Lombards (b) does not allow a woman that has taken a religious habit, though she has made no vow, to marry; because, says this law, "if a spouse who has been contracted to a woman only by a ring, cannot without guilt be married to another; by a much stronger reason the spouse
N n 2 " of

(a) Aulus Gellius, book 20. chap. 1.

† We find in the verbal process of this ordinance the motives that determined him.

‡ In his ordinance of Montel-les-tours in the year 1453.

|| They might punish the attorney, without there being any necessity of disturbing the public order.

** The ordinance of the year 1667, has made some regulations upon this head.

(b) Book 12. § 37.

" of God, or of the blessed virgin." Now I say, that in laws the arguments should be drawn from one reality to another, and not from reality to figure, or from figure to reality.

A law enacted by Constantine (b) ordains, that the single testimony of a bishop should be sufficient, without listening to any other witnesses. This prince took a very short method ; he judged of affairs by persons, and of persons by dignities.

The laws ought not to be subtle ; they are designed for people of common understanding, not as an art of logic, but as the plain reason of a father of a family.

When there is no necessity for exceptions and limitations in a law, it is much better to omit them ; details of that kind throw people into new details.

No alteration should be made in a law without sufficient reason. Justinian ordained, that a husband might be repudiated, without the wife's losing her portion, if for the space (c) of two years he had been incapable of consummating the marriage. He altered his law afterwards, and allowed the (d) poor wretch three years. But in a case of that nature two years are as good as three, and three are not worth more than two.

When a legislator condescends to give the reason of his law, it ought to be worthy of its majesty. A Roman (e) law decrees, that a blind man is incapable to plead, because he cannot see the ornaments of the magistracy. So bad a reason must have been given on purpose when such a number of good reasons were at hand.

Paul the civilian (f) says, that a child grows perfect in the seventh month, and that the proportion of Pythagoras's numbers seems to prove it. It is very extraordinary that they should

(b) In father Simond's appendix to the Theodosian code, tom. 1.

(c) Leg. 1. Code de Repudiis.

(d) See the Authentic Sed hodie, in the code de Repudiis.

(e) Leg. 1. ff. de postulando.

(f) In his sentences, book 1. tit. 9.

should judge of those things by the proportion of Pythagoras's numbers.

Some French lawyers have asserted, that when the king made an acquisition of a new country, the churches became subject to the *Regale*, because the king's crown is round. I shall not examine here into the king's rights, or whether in this case the reason of the civil or ecclesiastical law ought to submit to that of the law of politics: I shall only say, that those august rights ought to be defended by grave maxims. Was there ever such a thing known, as the real rights of a dignity, founded on the figure of that dignity's sign.

Davila (a) says, that Charles IX. was declared of age in the parliament of Rouen at fourteen years commenced, because the laws require every moment of the time to be reckoned, in cases relating to the restitution and administration of an orphan's estate; whereas it considers the year commenced as a year complete, when the case is concerning the acquisition of honours. I am very far from censuring a regulation which has been hitherto attended with no inconveniency; I shall only take notice that the reason alledged (b) is not the true one; it is false that the government of a nation is only an honour.

In point of presumption, that of the law is far preferable to that of the man. The French law (c) considers every act of a merchant during the ten days preceding his bankruptcy as fraudulent: this is the presumption of the law. The Roman law inflicted punishments on the husband who kept his wife after she had been guilty of adultery, unless he was induced to it thro' fear of the event of a law-suit, or through contempt of his own shame; this is the presumption of the man. The judge must have presumed the motives of the husband's conduct, and must have determined a very obscure and ambiguous point: when the law presumes, it gives a fixed rule to the judge.

Plato's

(a) Della guerra civile di Francia, page 96.

(b) The chancellor de l'Hopital, *ibid.*

(c) It was made in the month of November, 1702.

Plato's law, as I have observed already, required that a punishment should be inflicted on the person that killed himself, not with a design of avoiding shame, but through faint-heartedness. This law was defective in this respect, that in the only case in which it was impossible to draw from the criminal an acknowledgment of the motive upon which he had acted, it required the judge to determine concerning these motives.

As useless laws debilitate such as are necessary, so those that may be easily eluded weaken the legislation. Every law ought to have its effect, and no one should be ever suffered to deviate from it by a particular convention.

The Falcidian law ordained among the Romans, that the heir should always have the fourth part of the inheritance: another law * suffered the testator to prohibit the heir from retaining this fourth part. This is making a jest of the laws. The Falcidian law became useless; for if the testator had a mind to favour his heir, the latter had no need of the Falcidian law; and if he did not intend to favour him, he forbade him to make use of the Falcidian law.

Care should be taken that the laws be worded in such a manner, as not to be contrary to the very nature of things. In the proscription of the prince of Orange, Philip II. promises to any man that will kill the prince, to give him or his heirs five and thousand crowns, together with nobility; and this upon the word of a king, and as a servant of God. To promise nobility for such an action! to ordain such an action in the quality of a servant of God! This is equally subversive of the ideas of honour, morality, and religion.

There very seldom happens to be a necessity of prohibiting a thing which is not bad, under pretence of some imaginary perfection.

There ought to be a certain simplicity and candour in the laws; made to punish the iniquity of men, they themselves ought

* It is the authentic, *sed cum testator.*

ought to have the most spotless innocence. We find in the law of the (z) Visigoths that ridiculous request, by which the Jews were obliged to eat every thing dressed with pork, provided they did not eat the pork itself. This was a very great cruelty; they were obliged to submit to a law contrary to their own; and they were allowed to retain nothing more of their own, than what might serve as a mark to distinguish them.

CHAP. XV.

A bad Method of giving Laws.

THE Roman emperors manifested their will like our princes, by decrees and edicts; but they permitted, which our princes do not do, both the judges and private people to interrogate them by letters in their several differences; and their answers were called rescripts. The decretals of the Popes are rescripts, strictly speaking. It is plain, that this is a bad method of legislation. Those who thus apply for laws are bad guides to the legislator; the facts are always wrong stated. Julius Capitolinus (a) says, that Trajan often refused to give this kind of rescripts, lest a single decision and frequently a particular favour should be extended to all cases. Macrinus (b) had resolved to abolish all those rescripts; he could not bear that the answers of Commodus, Caracalla, and all those other ignorant princes, should be considered as laws. Justinian thought otherwise, and he filled his complement with them.

I would advise those who read the Roman laws, to distinguish carefully between this sort of hypothesis, and the *Senatus-consulta*, the *Plebiscita*, the general constitutions of the emperors, and all the laws founded on the nature of things, on the frailty of women, the weakness of minors, and the public utility.

CHAP.

(z) Book 12. tit. 2. § 16.

(a) See Julius Capitolinus in Macrino.

(b) Ibid.

CHAP. XVI.

Of the Ideas of Uniformity.

THERE are certain ideas of uniformity, which sometimes strike great geniuses, (for they even affected Charlemagne), but infallibly make an impression on little souls. They discover therein a kind of perfection, because it is impossible for them not to discover it; the same weights in the police, the same measures in commerce, the same laws in the state, the same religion in all its parts. But is this always right, and without exception? Is the evil of changing always less than that of suffering? And does not a greatness of genius consist rather in distinguishing between those cases in which uniformity is requisite, and those in which there is a necessity for differences? In China the Chinese are governed by the Chinese ceremonial; and the Tartars by theirs: And yet there is no nation in the world that aims so much at tranquility. If the people observe the laws, what signifies it whether these laws are the same?

CHAP. XVII.

Of Legislators.

ARISTOTLE wanted to satisfy, sometimes his jealousy against Plato, and sometimes his passion for Alexander. Plato was incensed against the tyranny of the people of Athens. Machiavel was full of his idol, the duke of Valentinois. Sir Thomas More, who spoke rather of what he had read than of what he thought, wanted (a) to govern all states with the simplicity of a Greek city. Harrington was full of the idea, of his favourite republic of England, whilst a croud of writers saw nothing but con-

(a) In his Utopia.

confusion where they saw no crown. The laws always meet the passions and prejudices of the legislator ; sometimes they pass through, and imbibe only a tincture ; sometimes they stop, and are incorporated with them.

BOOK XXX.

Theory of the Feudal Laws among the Franks, in the relation they bear to the establishment of the Monarchy.

CHAP. I.

Of Feudal Laws.

I SHOULD think my work imperfect, were I to pass over in silence an event which happened once, and never perhaps will happen more ; were I not to speak of those laws which appeared of a sudden all over Europe, without having any connection with those hitherto known ; of those laws which have done infinite good and infinite mischief ; which have left rights when the demesne has been ceded ; which, by vesting several persons with different kinds of feigniory over the same things or persons, have diminished the weight of the whole feigniory ; which have established different limits in empires of too great an extent ; which have been productive of rule with an inclination to anarchy, and of anarchy with a tendency to order and harmony.

This would require a particular work to itself ; but considering the nature of the present undertaking, the reader will here

meet rather with a general survey, than with a complete treatise of those laws.

The feudal laws form a very beautiful prospect. A venerable old * oak raises its lofty head to the skies; the eye sees from afar its spreading leaves: upon drawing nearer, it perceives the trunk, but does not discern the root; the ground must be dug up to discover it.

CHAP. II.

Of the Source of Feudal Laws.

THE conquerors of the Roman empire came from Germany..

Though few ancient authors have described their manners, yet we have two of very great weight. Cæsar making war against the Germans, described the manners (a) of that nation; and upon these he regulated † some of his enterprises. A few pages of Cæsar upon this subject are equal to whole volumes.

Tacitus has wrote an entire work on the Manners of the Germans. This work is short; but it comes from the pen of Tacitus, who was always concise, because he saw every thing at one glance.

These two authors agree so perfectly with the codes still extant of the laws of the Barbarians, that reading Cæsar and Tacitus we imagine we are reading these codes, and in reading these codes we fancy we are reading Cæsar and Tacitus.

But if in the research of the feudal laws, I find myself in a dark labyrinth full of windings and detours, I think I have the clue in my hand, and that I shall be able to find my way through.

CHAP.

* ————— Quantum vertice ad oras
Aethereas, tantum radice ad Tartara tendit.

VIRGIL.

(a) Book vi.

† For instance, his retreat from Germany. Ibid.

CHAP. III.

The Origin of Vassalage.

CÆSAR * says: " That the Germans neglected agriculture, " that the greatest part of them lived upon milk, cheese, " and flesh; that no one had lands or boundaries of their own: " that the princes and magistrates of each nation allotted what " portion of land they pleased, and where they pleased, to every " individual, and obliged them the year following to remove " elsewhere." Tacitus says (b): " That each prince had a " multitude of men, who were attached to his service, and followed him wherever he went." This author gives them a name in his language relative to their state, which is that of *companions* (c). They had a strong emulation to distinguish themselves in the prince's esteem; and the princes had the same emulation to distinguish themselves in the bravery and number of their companions. " Their dignity and power," continues Tacitus, " consist in being constantly surrounded " with a multitude of young and chosen people: this they reckon an ornament in peace, a defence and support in war. " Their name becomes famous at home, and among neighbouring nations, when they excell all others in the number " and courage of their companions: they receive presents and embassies from all parts. Reputation frequently decides the " fate of war. In battle it is infamy in the prince to be surpassed " in courage; it is infamy in the companions not to follow " the brave example of their prince; it is an eternal disgrace " to survive him. To defend him is their most sacred engagement. If a city is at peace, the princes go to those who " are at war; it is by this means they retain a great number

O o 2

" of

* Book 6. of the Gallic wars. Tacitus adds, nulli domus, aut ager, aut aliqua cura; prout ad quem venire aluntur. De moribus German.

(b) De morib. German.

(c) Comites.

“ of friends. To these they give the war-horse and the terrible javelin. Their pay consists in coarse but large repasts. The prince supports his liberality merely by war and plunder. You might easier persuade them to challenge the enemy, and to expose themselves to wounds, than to cultivate the land, and attend to the cares of husbandry; they refuse to acquire by sweat what they can purchase with blood.”

Thus, among the Germans there were vassals, but no fiefs; they had no fiefs, because the princes had no lands to give; or rather their fiefs consisted in horses trained for war, in arms, and feasting. There were vassals, because there were trusty men, who were bound by their word, who were engaged to follow the prince to the field, and performed very near the same service as was afterwards performed for the fiefs.

Cæsar says (a), that “ when any of the princes declared to the assembly that he intended to set out upon some expedition, and asked them to follow him, those who approved the leader, and the enterprize, stood up and offered their assistance. Upon which they were commended by the multitude. But if they did not fulfill their engagements, they lost the public esteem, and were looked upon as deserters and traitors.”

What Cæsar says in this place, and what we have extracted in the preceding chapter from Tacitus, is the foundation of the history of our princes of the first race.

We must not therefore be surprised, that our kings should have new armies to raise upon every expedition, new troops to persuade, new people to engage; that to acquire much they were obliged to spend a great deal; that they should incessantly acquire by the division of lands and spoils, and give these lands and spoils incessantly away; that their demesne should continually increase and diminish; that a father, upon giving a kingdom (b) to one of his children, should always accompany it with

(a) De Bello Gallico, lib. vi.

(b) See the life of Dagobert.

with a treasure ; that the king's treasure should be considered as necessary to the monarchy ; and that one * king could not give part of it to strangers, even in portion with his daughter, without the consent of the other kings. The monarchy moved by springs, which they were constantly obliged to wind up.

CHAP. IV.

Of the Conquests of the Franks.

IT is not true that the Franks, upon entering Gaul, took possession of all the country to turn it into fiefs. This has been the opinion of some people, because they saw almost all the country towards the end of the second race converted into fiefs, rear-fiefs, or other dependencies ; but this was owing to particular causes, which we shall explain hereafter.

The consequence which some would infer from thence, that the Barbarians made a general regulation for establishing in all parts the state of villainage, is not less false than the principle. If at a time when the fiefs were precarious, all the lands of the kingdom had been fiefs or dependencies of fiefs, and all the men in the kingdom vassals or bondmen subordinate to vassals ; as the person that has property is always possessed of power, the king, who continually disposed of the fiefs, that is, of the only property then existing, would have been possessed of as arbitrary a power as the Grand Signior is in Turkey ; which is absolutely contradictory to all history.

CHAP.

* See Gregory of Tours, book vi. on the marriage of the daughter of Chilperic. Childbert sends ambassadors to tell him, that he should not give the cities of his father's kingdom to his daughter, nor his treasures, nor his bondmen, nor horses, nor horsemen, nor teams of oxen, &c.

CHAP. V.

Of the Goths, Burgundians, and Franks.

GAUL was invaded by German nations. The Visigoths took possession of the province of Narbonne, and of almost all the south; the Burgundians settled in the east; and the Franks subdued very near all the rest.

No doubt but these Barbarians retained in their respective conquests the manners, inclinations, and usages of their own country; for no nation can change in an instant their manner of thinking and acting. These people in Germany neglected agriculture. It seems, by Cæsar and Tacitus, that they applied themselves greatly to a pastoral life: hence the regulations of the codes of Barbarian laws are almost all relating to their flocks. Roricon, who wrote a history among the Franks, was a shepherd.

CHAP. VI.

Different ways of Dividing the Lands.

AFTER the Goths and Burgundians had under various pretences penetrated into the heart of the empire, the Romans, in order to put a stop to their devastations, were obliged to provide for their subsistence. At first they allowed them * corn: but afterwards they chose to give them lands. The emperors, or the Roman † magistrates in their name, made particular conventions with them concerning the division of lands,

as

* The Romans obliged themselves to this by treaties.

† Burgundiones partem Gallie occuparunt, terrasque cum Gallicis senatoribus diviserunt. Marius's Chronicle, in the year 456.

as we find by the chronicles and in the codes of the Visigoths and (a) Burgundians §.

The Franks did not follow the same plan. In the Salic and Ripuarian laws we find not the least vestige of any such division of lands: they had conquered the country, and so took what they pleased, making no regulations but amongst themselves.

Let us therefore distinguish between the conduct of the Burgundians and Visigoths in Gaul, of those same Visigoths in Spain, of the (b) auxiliary troops under Augustulus and Odoacer in Italy, and that of the Franks in Gaul, and of the Vandals (c) in Africa. The former entered into conventions with the ancient inhabitants, and in consequence thereof made a division of lands between them; the latter did no such thing.

What has induced some people to think that the Roman lands were entirely usurped by the Barbarians, is their finding in the laws of the Visigoths and Burgundians, that these two nations had two thirds of the lands: but this they took only in certain quarters assigned them.

Gundebald † says in the law of the Burgundians, that his people at their establishment had two thirds of the lands allowed them; and the second supplement ‡ to this law takes notice, that only a moiety would be allowed to those who should hereafter come to live in that country. Therefore all the lands had not been divided in the beginning between the Romans and the Burgundians.

In

(a) Book x. tit. 1. § 8. 9. & 16.

(b) See Procopius' war of the Goths.

(c) See Procopius' war of the Vandals.

§ Chap. 54. § 1. & 2. This division was still subsisting in the time of Lewis the Pious, as appears by his capitulary of the year 829, which has been inserted in the law of the Burgundians, tit. 79. § 1.

† Licet eo tempore quo populus noster mancipiorum tertiam & duas terrarum partes accepit, &c. Law of the Burgundians, tit. 54. § 1.

‡ Ut non amplius a Burgundionibus qui infra venerunt requiratur, quam ad præsens necessitas fuerit, medietas terræ, art. 11.

In the texts of those two regulations we meet with the same expressions ; consequently they explain one another ; and as the second cannot be understood to mean an universal division of lands, neither can this signification be given to the first.

The Franks acted with the same moderation as the Burgundians ; they did not strip the Romans wherever they extended their conquests. What would they have done with so much land ? They took what suited them, and left the rest.

CHAP. VII.

A just Application of the Law of the Burgundians and of that of the Visigoths in relation to the Division of Lands.

IT is to be considered that those divisions of land were not made with a tyrannical spirit ; but with a view of relieving the reciprocal wants of the two nations that were to inhabit the same country.

The law of the Burgundians ordains that a Burgundian shall be received in an hospitable manner by a Roman. This is agreeable to the manners of the Germans, who, according to Tacitus (a), were the most hospitable people in the world.

By the law of the Burgundians it is ordained, that the Burgundians shall have two thirds of the lands and one third of the bondmen. In this it considered the genius of the two nations, and conformed to the manner in which they procured their subsistence. As the Burgundians dealt chiefly in cattle, they wanted a great deal of land and few bondmen ; and the Romans, from their application to agriculture, had need of less land and of a greater number of bondmen. The woods were equally divided, because their wants in this respect were the same.

We find in the code (b) of the Burgundians, that each Barbarian was placed near to a Roman. The division therefore

was

(a) De morib. German.

(b) And that of the Visigoths.

was not general; but the Romans, who gave the division were equal in number to the Burgundians who received it. The Roman was injured the least possible: The Burgundians as a martial people, fond of hunting and of a pastoral life, did not refuse to accept of the fallow grounds; while the Romans kept such lands as were properest for culture: the Burgundian's flock fattened the Roman's field.

CHAP. VIII.

Of Servitudes.

THE law of the Burgundians (a) takes notice, that when those people settled in Gaul, they were allowed two thirds of the land, and one third of the bondmen. The state of villainage was therefore * established in that part of Gaul before it was invaded by the Burgundians.

The law of the Burgundians in points relating to the two nations, makes a formal † distinction in both, between the nobles, the free-born, and the bondmen. Servitude was not therefore a thing particular to the Romans; nor liberty and nobility particular to the Barbarians.

This very same law says (b), that if a Burgundian freedman had not given a particular sum to his master, nor received a third share of a Roman, he was always supposed to belong to his master's family. The Roman proprietor was therefore free, since he did not belong to another person's family; he was free, because his third portion was a mark of liberty.

We need only open the Salic and Ripuarian laws, to be satisfied that the Romans were no more in a state of servitude among the Franks, than among the other conquerors of Gaul.

VOL. II.

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* This is confirmed by the whole title of the code de Agricolis, & Censitis, & Colonis.

† Si dentem optimati Burgundioni vel Romano nobili excusserit, tit. 26. § 1. & si mediocribus personis ingenuis, tam Burgundionibus quam Romanis. Ibid. § 2.

(a) Tit. 54.

(b) Tit. 57.

The Count de Boulainvilliers is mistaken in the capital point of his system: he has not proved that the Franks made a general regulation to reduce the Romans into a kind of servitude.

As this author's work is penned without art, and as he speaks with the simplicity, frankness and candour of that ancient nobility from whom he descends, every one is capable of judging of the fine things he says, and of the errors into which he has fallen. I shall not therefore undertake to criticise him; I shall only observe, that he had more wit than understanding, more understanding than knowledge; though his knowledge was not contemptible, for he was well acquainted with the most valuable part of our history and laws.

The Count de Boulainvilliers, and the Abbe du Bos, have formed two different systems, one of which seems to be a conspiracy against the commons, and the other against the nobility. When the sun gave leave to Phaeton to drive his chariot, he said to him, "If you ascend too high, you will burn the heavenly mansions; if you descend too low, you will reduce the earth to ashes: Do not drive to the right, you will meet there with the constellation of the serpent; avoid going too much to the left, you will there fall in with that of the altar: keep in the middle *."

What first gave rise to the notion of a general regulation made at the time of the conquest, is our meeting with a prodigious number of servitudes in France towards the beginning of the third race; and as the continual progression of these servitudes was not attended to, people imagined in an age of obscurity a general law which was never made.

Towards

* Nec preme, nec summum molire per aethera currum,
 Altius egressus, caelestia testa cremabis;
 Inferius, terras: medio tutissimus ibis.
 Non te dexterioꝝ tortum declinat ad anguem,
 Neve sinistroꝝ pressam rota ducat ad aram;
 Inter utramque tene.

OVID Metam. lib. ii.

Towards the commencement of the first race, we meet with an infinite number of freemen, both among the Franks and the Romans; but the number of bondmen increased to that degree, that at the beginning of the third race, all the husbandmen and almost all the inhabitants * of towns were become bondmen: and whereas at the first period there was very near the same administration in the cities as among the Romans, namely, bodies of citizens, a senate, and courts of judicature; at the other we hardly meet with any thing but a lord and his bondmen.

When the Franks, Burgundians, and Goths, made their several invasions, they took gold, silver, moveables, clothes, men, women, boys, and whatever the army could carry; the whole was brought to one place, and divided amongst the army (a). History shews, that after the first settlement, that is after the first devastations, they entered into an agreement with the inhabitants, and left them all their political and civil rights. This was the law of nations in those days; they plundered every thing in time of war, and granted every thing in time of peace. Were it not so, how should we find both in the Salic and Burgundian laws such a number of regulations absolutely contrary to a general servitude of the people?

But that which was not effected by the conquest, was effected by the same law of nations (b) which subsisted after the conquest. Opposition, revolts, and the taking of towns were followed with the servitude of the inhabitants. And, not to mention the wars which the different conquering nations made against one another, as there was this particularity among the Franks, that the different divisions of the monarchy gave rise continually to civil wars between brothers or nephews, in which this law of nations was constantly practised, servitudes of course

P p 2

became

* While Gaul was under the domination of the Romans, they formed particular bodies; these were generally freedmen, or the descendants of freedmen.

(a) See Gregory of Tours, book ii. chap. 27. Aimoin, book i. chap. 14.

(b) See the lives of the Saints in the next page.

became more general in France than in other countries: and this is, I believe, one of the causes of the difference between our French laws and those of Italy and Spain, in respect to the right of lordships.

The conquest was soon over; and the law of nations then in force was productive of some servitudes. The custom of the same law of nations, which obtained for many ages, gave a prodigious extent to those servitudes.

Theodoric (a) imagining that the people of Auvergne were not faithful to him, thus addressed the Franks of his division: "Follow me, and I will carry you into a country where you shall have gold, silver, captives, clothes, and flocks in abundance; and you shall remove all the people into your own country."

After the peace (b), which was concluded between Gontram and Chilperic, the troops employed in the siege of Bourges having had orders to return, carried such a large booty away with them, that they hardly left either men or cattle in the country.

I might quote here * authorities without number: and as the bowels of human compassion were moved at those miseries, as several holy prelates beholding the captives bound two and two, employed the treasure belonging to the church, and sold even the sacred utensils, to ransom as many as they could; and as several holy monks exerted themselves on that occasion, it is in the † lives of the saints that we meet with the best eclairsissements on this subject. And, notwithstanding what may be objected to the authors of those lives, namely their having been sometimes a little too credulous in respect to things which God has

* See the chronicle of Fredegarius, in the year 600, and his continuator, in the year 741; the annals of Fuld, in the year 739, and the lives of the saints in the next quotation.

† See the lives of S. Epiphanius, S. Eptadius, S. Cæsarius, S. Fidolus, S. Porcius, S. Treverius, S. Eufichius, and of S. Leger, the miracles of S. Julian, &c.

(a) Gregory of Tours book iii.

(b) Ibid. book vi. chap. 31.

has certainly performed, if they were necessary for the execution of his designs; yet we draw considerable lights from thence, in respect to the manners and usages of those times.

When we cast an eye upon the monuments of our history and laws, the whole seems to be a vast boundless ocean: all those frigid, dry, insipid, and crude writings must be devoured in the same manner, as Saturn is fabled to have devoured the stones.

A vast quantity of land which had been in the hands of freemen *, was changed into mortmain, when the country was stripped of its free inhabitants; those who had a great multitude of bondmen either took large territories by force, or had them yielded by agreement, and built villages, as may be seen in different charters. On the other hand, the freemen, who cultivated the arts, found themselves reduced to exercise those arts in a state of servitude: thus the servitudes restored to the arts and to agriculture whatever they had lost.

It was a customary thing with the proprietors of lands, to give them to the churches, in order to hold them themselves by a quit-rent, thinking to partake by their servitude of the sanctity of the churches.

CHAP. IX.

That the Lands belonging to the division of the Barbarians paid no Taxes.

A PEOPLE remarkable for their simplicity and poverty, a free and martial people, who lived without any other industry than that of tending their flocks, and who had nothing but rush cottages to attach them to their (a) lands; such a people, I say,

* Even the husbandmen themselves were not all slaves: see the 18th and 23d law in the code de Agriculis, & Censitis, & Colonis, and the 20th of the same title.

(a) See Gregory of Tours, book ii.

say, must have followed their chiefs for the sake of booty, and not to pay or to raise taxes. The art of tax-gathering is always invented too late, and when men begin to enjoy the felicity of other arts.

The transient tax of a pitcher of wine for every acre, which was one of the exactions of Chilperic and Fredegonda, relating only to the Romans. In fact, it was not the Franks that tore the rolls of those taxes, but the clergy, who in those days were all Romans. The burden of this tax lay chiefly on the inhabitants * of the towns; now these were almost all inhabited by Romans.

Gregory of Tours (a) relates, that a certain judge was obliged after the death of Chilperic to take refuge in a church, for having under the reign of that prince ordered taxes to be levied on several Franks, who in the reign of Childebert were *ingenui*, or freeborn: *Multos de Francis, qui tempore Childeberti regis ingenui fuerant, publico tributo subegit.* Therefore the Franks who were not bondmen paid no taxes.

There is not a grammarian but would be ashamed to see how the abbe du Bos (b) has interpreted this passage. He observes, that in those days the freed-men were called also *ingenui*. Upon this supposition he renders the Latin word *ingenui*, by *freed from taxes*; a phrase, which we indeed may use, as *freed from cares*, *freed from punishment*; but in the Latin tongue, such expressions as *ingenui a tributis*, *libertini a tributis*, *manumissi tributorum*, would be quite monstrous.

We find in the law of the Visigoths †, that when a Barbarian had seized upon the estate of a Roman, the judge obliged him to sell it, to the end that this estate might continue to be tributary; consequently the Barbarians paid no taxes.

The

* *Quæ conditio universis urbibus per Galliam constituta summopere est adhibita.* Life of S. Aridius

† *Judices atque præpositi tertias Romanorum, ab illis qui occupatas tenent, auferant, & Romanis sua exactione sine aliqua dilatione restituant, ut nihil fisco debeat deperire, lib. x. tit. 1. chap. 14.*

(a) Book vii.

(b) Establishment of the French monarchy, tom. iii. chap. 14. page, 515.

The abbe du Bos, (a) who, to support his system, would fain have the Visigoths subject to taxes ‡, quits the literal and spiritual sense of the law, and pretends upon no other indeed than an imaginary foundation, that between the establishment of the Goths and this law, there had been an augmentation of taxes which related only to the Romans. But none but father Hardouin are allowed to exercise thus an arbitrary power over facts.

The same author makes a wrong use of the capitularies, as well as of the historians and laws of the barbarous nations. When he wants the Franks to pay taxes, he applies to freemen what can be understood only of (b) bondmen; when he speaks of their military service, he applies to (c) bondmen what can never relate but to freemen.

CHAP. X.

Of Taxes paid by the Romans and Gauls, in the monarchy of the Franks.

I MIGHT here examine whether after the Gauls and Romans were conquered, they continued to pay the taxes to which they were subject under the emperors. But, in order to proceed with greater expedition, I shall be satisfied with observing, that if they paid them in the beginning, they were soon after exempted, and that those taxes were changed into a military service. For I confess I cannot conceive how the Franks should have been at first such great friends, and afterwards such sudden and violent enemies to taxes.

A capitulary * of Lewis the Pious explains extremely well the situation of the freemen in the monarchy of the Franks. Some troops

(a) Establishment of the Franks in Gaul, tom. iii. chap. 14, page 510.

‡ He lays a stress upon another law of the Visigoths, book x. tit. 1. art. 11. which proves nothing at all; it says only, that he who has received of a lord a piece of land on condition of a rent or service, ought to pay it.

(b) Establishment of the French monarchy, tom. iii. chap. 14. page 513. where he quotes the 28th article of the edict of Pistes.

(c) Ibid. tom. iii, chap 4. page 298.

* In the year 815, chap. 1. which is agreeable to the capitulary of Charles the Bald, in the year 844, art. 1. & 2.

troops † of Goths or Iberians, flying from the oppression of the Moors, were received in Lewis's dominions. The agreement made with them was, that like other freemen they should follow their count to the army; that upon a march they should mount guard, ‡ and patrol under the command also of their count; and that they should furnish horses and carriages for baggage to the king's commissaries, and to the ambassadors in their way to and from court; and that they should not be compelled to pay any farther acknowledgment, but should be treated as the other freemen.

It cannot be said that these were new usages introduced towards the commencement of the second race. This must be referred at least to the middle or to the end of the first. A capitulary of the year 864 ††, says in express terms, that it was the ancient custom for freemen to perform military service, and to furnish likewise the horses and carriages above-mentioned; duties particular to themselves, and from which those who possessed the fiefs were exempt, as we shall prove hereafter.

This is not all; there was a regulation || which hardly permitted the imposing of taxes on those freemen. He who had four manors || was always obliged to march against the enemy; he who had but three, was joined with a freeman that had only one; the latter bore the fourth part of the other's charges, and staid at home. In like manner, they joined two freemen who had

† Pro Hispanis in partibus Aquitanie, Septimanie, & Provincie consistentibus. Ibid.

‡ Excubias & explorationes quas Wastas dicunt. Ibid.

†† Ut Pagenfes Franci, qui caballos habent, cum suis comitibus in hostem pergant. The counts are forbid to deprive them of their horses, ut hostem facere, & debitos paraveredos secundum antiquam consuetudinem exsolvere possint. Edict of Pistes in Baluzius, p. 186.

||| Capitulary of Charlemagne, in the year 812, chap. 1. Edict of Pistes in the year 864, art. 27.

|| Quatuor Manfos. I fancy what they call Mansus was a particular portion of land belonging to a farm where there were bondmen; witness the capitulary of the year 853, apud Sylvacum, tit. xiv. against those who drove the bondmen from their Mansus.

had each two manors ; he who went to the army had half his charges bore by him who staid at home.

Again, we have an infinite number of charters, in which the privileges of fiefs are granted to lands or districts possessed by freemen, and of which I shall make further mention hereafter. These lands are exempted from all the duties or services, which were required of them by the counts and by the rest of the king's officers : and as all these services are particularly enumerated, without making any mention of taxes, it is manifest that no taxes were imposed upon them.

It was very natural that the Roman art of tax-gathering should fall of itself in the monarchy of the Franks ; it was a most complicated art, far above the conception, and wide from the plan, of those simple people. Were the Tartars to over-run Europe, we should find it very difficult to make them comprehend what is meant by one of our financiers.

The (a) anonymous author of the life of Lewis the Pious, speaking of the counts and other officers of the nation of the Franks, whom Charlemagne established in Aquitania, says, that he intrusted them with the care of defending the frontiers, as also with the military power and the intendancy of the demesnes belonging to the crown. This shews the state of the royal revenues under the second race. The prince had kept his demesnes in his own hands, and employed his bondmen in improving them. But the indictions, the capitations, and other imposts raised at the time of the emperors on the persons or goods of freemen, had been changed into an obligation of defending the frontiers, and marching against the enemy.

The bishops writing (b) to Lewis brother to Charles the Bald, use these words : " Take care of your lands, that you may not
" be obliged to travel continually by the houses of the clergy,
" and to tire their bondmen with carriages. Manage your
VOL. II. Q q " affairs,

(a) In Pithou, part ii. page 157.

(b) See the capitulary of the year 858, art. 14.

“ affairs, continue they, in such a manner, that you may have enough to live upon, and to receive embassies.” It is evident that the king’s revenues † in those days consisted in their demefnes.

CHAP. XI.

Of what they called Censur.

AFTER the Barbarians had quitted their country, they were desirous of reducing their usages into writing : but as they found a difficulty in writing German words with Roman letters, they published these laws in Latin.

In the confusion and rapidity of the conquest, most things changed their nature : in order, however, to express them, they were obliged to make use of such old Latin words as were most analogous to the new usages. Thus, whatever was likely to revive * the idea of the ancient census of the Romans, they called by the name of *census*, *tributum* : and when things had no relation at all to the Roman census, they expressed, as well as they could, the German words by Roman letters : thus they formed the word *fredum*, on which I shall have occasion to descant in the following chapters.

The words *census* and *tributum* having been employed in an arbitrary manner, this has thrown some obscurity on the signification in which these words were used under our princes of the first and second race. And modern † authors, who had adopted

† They levied also some duties on rivers, where there happened to be a bridge or a passage.

* The census was so generical a word, that they made use of it to express the tolls of rivers, when there was a bridge or ferry to pass. See the third capitulary, in the year 803, edition of Baluzius, page 395. art. 1. & the 5th in the year 819, page 616. They gave likewise this name to the carriages furnished by the freemen to the king, or to his commissaries, as appears by the capitularies of Charles the Bald, in the year 865, art. 8.

† The Abbe du Bos, and his followers.

adopted particular systems, having found these words in the writings of those days, imagined that what was then called census, was exactly the census of the Romans; and from thence they inferred this consequence, that our kings of the two first races had put themselves in the place of the Roman Emperors, and made no change ‡ in their administration. Besides, as particular duties raised under the second race were by chance and by certain || restrictions converted into others, they inferred from thence that these duties were the census of the Romans: and as, since the modern regulations, they found that the crown demesnes were absolutely unalienable, they pretended that those duties which represented the Roman census, and did not form a part of the demesnes, were mere usurpations. I omit the other consequences.

To apply the ideas of the present time to distant ages, is a most fruitful source of error. To those people who want to modernize all the ancient ages, I shall say what the Egyptian priests said to Solon, "O Athenians, you are mere children!"

CHAP. XII.

That what they called Census was raised only on the Bondmen, and not on the Freeman.

THE king, the clergy, and the lords raised regular taxes, each on the bondmen of their respective demesnes. I prove it with respect to the king, by the capitulary *de Villis*; but with regard to the clergy, by the codes of the * laws of the Barbarians;

Q q 2

‡ See the weakness of the arguments produced by the Abbe du Bos, in the establishment of the French monarchy, tom. 3. book 6. chap. 14. especially in the inference he draws from a passage of Gregory of Tours, concerning a dispute between his church and King Charibert.

|| For instance, by enfranchisements.

* Law of the Allemans, chap. 22, and the law of the Bavarians, tit. 1. chap. 14. where the regulations are to be found which the clergy made concerning their order.

barians ; and with relation to the lords, by the regulations (a) which Charlemagne made concerning this subject.

These taxes were called *census* ; they were æconomical, and not fiscal duties, mere private services, and not public obligations.

I affirm, that what they called *census* at that time, was a tax raised upon the bondmen. This I prove by a formulary of Marculfus, containing a permission from the king to enter into holy orders, provided the person be † free-born, and not enrolled in the register of the *census*. I prove it also by a commission from Charlemagne to a count (b), whom he had sent into Saxony ; which contains the enfranchisement of the Saxons for having embraced Christianity, and is properly a charter of freedom ‡. This prince restores them to their former || civil liberty, and exempts them from paying the *census*. It was therefore the same thing to be a bondman, as to pay the *census* ; to be free as not to pay it.

By a kind of letters patent * of the same prince in favour of the Spaniards, who had been received into the monarchy, the counts are forbid to demand any *census* of them, or to deprive them of their lands. That strangers upon their coming to France were treated as bondmen, is a thing well known : and Charlemagne being desirous they should be considered as freemen, since he would have them be proprietors of their lands, forbid the demanding any *census* of them.

A capitulary of Charles the Bald (c), given in favour of those very Spaniards, orders them to be treated like the other Franks, and

(a) Book 5th of the capitularies, chap. 303.

† Si ille de capite suo bene ingenuus sit, et in Puletico publico censitus non est. Lib. 1. formul. 19.

(b) In the year 789, edition of the capitularies by Baluzius, vol. i. page 250.

‡ Et ut ista ingenuitates pagina firma stabilisque consistat. Ibid.

|| Pristinæque libertati donatos, & omni nobis debito censu solutos. Ibid.

* Præceptum pro Hispanis, in the year 812. edition of Baluzius, tom. 1. page 500.

(c) In the year 844. edition of Baluzius, tom. 2. art. 1. & 2. page 17.

and forbids the requiring any census of them: consequently this census was not paid by freemen.

The thirtieth article of the edict of Pistes reforms the abuse, by which several of the husbandmen belonging to the king or to the church, sold the lands dependent on their manors to ecclesiastics, or to people of their condition, reserving only a small cottage to themselves; by which means they avoided paying the census; and it ordains, that things should be restored to their primitive situation: the census was therefore a tax peculiar to bondmen.

From thence also it follows, that there was no general census in the monarchy; and this is clear from a great number of passages. For what could be the meaning of this † capitulary? “We ordain that the royal census shall be levied in all places where formerly it was ‡ lawfully levied.” What could be the meaning of that in which (b) Charlemagne orders his commissaries in the provinces to make an exact enquiry into all the census’s that belonged in former times * to the king’s demesne? And of that (a) in which he disposes of the census’s paid by those † of whom they are demanded? What can that other capitulary (b) mean, in which we read, “If any person ‡ has acquired a tributary land, on which we were accustomed to
“ levy

† Third capitulary of the year 805. art. 20. & 23. inserted in the collection of Ansegise, book 3. art. 15. This is agreeable to that of Charles the Bald, in the year 854, apud Attiniacum, art. 16.

‡ Undecunque legitime exigebatur. Ibid.

(b) In the year 812. art. 10. and 11. edition of Baluzius, tom. 1. page 498.

* Undecunque antiquitus ad partem regis venire solebant. Capitulary of the year 812. art. 10. 11.

(a) In the year 813. art. 6. edition of Baluzius, tom. 1. page 508.

† De illis unde censa exigunt. Capitulary of the year 813. art. 6.

(b) Book 4. of the Capitularies, art. 37. and inserted in the Law of the Lombards.

‡ Si quis terram tributariam, unde census ad partem nostram exire solebat, suscepit. Book 4. of the capitularies, art. 37.

"levy the census?" And that other, in fine (c), in which Charles the Bald || makes mention of the censual lands, whose census had from time immemorial belonged to the king.

Observe that there are some passages which seem at first sight to be contrary to what I have said, and yet they confirm it. We have already seen that the freemen in the monarchy were obliged only to furnish particular carriages: the capitulary just now cited gives to this § the name of census, and opposes it to the census paid by the bondmen.

Besides, the edict (d) of Pistes takes notice of those freemen who were obliged to pay the royal census for their ** head for their cottages, and who had sold themselves during the famine. The king orders them to be ransomed. This is †† because those who were manumitted by the king's letters, did not, generally speaking, acquire a full and perfect liberty, ‡‡ but they paid *censum in capite*; and these are the people here meant.

We must therefore explode the idea of a general and universal census, derived from the Roman policy, from which census the rights of the lords are also supposed to have been derived by usurpations. What was called *census* in the French monarchy, independently of the abuse made of that word, was a particular tax imposed on the bondmen by their masters.

I beg the reader to excuse the trouble I must give him with such a number of citations. I should be more concise, did I not meet with the abbe du Bos's book on the establishment of the

(c) In the year 805. art. 8.

|| Unde census ad partem regis exivit antiquitus. Capitulary of the year 805. art. 8.

§ Censibus vel paraveredis quos franci homines ad regiam potestatem exsolvere debent.

(d) In the year 864. art. 34. edition of Baluzius, page 192.

** De illis francis hominibus qui censum regium de suo capite & de suis recellis debeant. Ibid.

†† The 28th article of the same edict explains this extremely well; it even makes a distinction between a Roman freedman and a Frank freedman: And we likewise see there that the census was not general; it deserves to be read.

‡‡ As appears by a capitulary of Charlemagne in the year 813. which we have already quoted.

the French monarchy in Gaul, continually in my way. Nothing is a greater obstacle to our progress in knowledge, than a bad performance of a celebrated author; because, before we instruct, we must begin with undeceiving.

CHAP. XIII.

Of the Feudal Lords or Vassals.

I HAVE taken notice of those volunteers among the Germans, who followed their princes in their several expeditions. The same usage continued after the conquest. Tacitus mentions them by the name of companions (a); the Salic law by that of men who have vowed fealty * to the king; the formularies of (b) Marculfus by that of the king's Antrustio's †; the earliest French historians by that of Leudes ‡, faithful and loyal; and those of later date by that of vassals § and lords.

In the Salic and Ripuarian laws we meet with an infinite number of regulations in regard to the Franks, and only with a few for the Antrustio's. The regulations concerning the Antrustio's are different from those which were made for the other Franks; they are full of what relates to the settling of the property of the Franks, but mention not a word concerning that of the Antrustio's. This is because the property of the latter was regulated rather by the political than by the civil law, and was the share that fell to an army, and not the patrimony of a family.

The

(a) Comites.

* Qui sunt in truste regis, tit. 44. art. 4.

(b) Book 1. formul. 18.

† From the word *trew*, which signifies faithful, among the Germans.

‡ Leudes, fideles.

§ Vassalli seniores.

The goods reserved for the feudal lords were called *fiscal* § goods, benefices, honours, and fiefs, by different authors, and in different times.

There is no doubt but the fiefs at first were at will (a). We find in Gregory of Tours (b), that Sunegifilus and Gallo-manus were deprived of all they held of the exchequer, and no more left than what was their real property. When Gontram raised his nephew Childebert to the throne, he had a private conference with him, in which he named * the persons who ought to be honoured with, and those who ought to be deprived of the fiefs. In a formulary † of Marculfus, the king gives in exchange not only the benefices held by his exchequer, but likewise those which had been held by another. The law of the Lombards opposes (c) the benefices to property. In this our historians, the formularies, the codes of the different barbarous nations, and all the monuments extant of those days, are unanimous. In fine, the writers of the book of fiefs ‡ inform us, that at first the lords could take them back when they pleased, that afterwards they granted them for the space of a year §, and that at length they gave them for life.

CHAP.

§ *Fiscalia*. See the 14th formulary of Marculfus, book 1. It is mentioned in the life of St Maur, *dedit fiscum unum*: and in the annals of Metz, in the year 747, *dedit illi comitatus & fiscos plurimos*. The goods designed for the support of the royal family were called *regalia*.

(a) See the 1st book, tit. 1. of the fiefs; and Cujas on that book.

(b) Book 9th, chapter 38.

* *Quos honoraret muneribus, quos ab honore depelleret*. Ibid. lib. 7.

† *Vel reliquis quibuscumque beneficiis, quodcumque ille, vel fiscus noster, in ipsis locis tenuisse noscitur*, Lib. 1. formul. 30.

(c) Lib. 3. tit. 8. § 3.

‡ *Antiquissimo enim tempore sic erat in Dominorum potestate connexum, ut quando vellet possent auferre rem in feudum a se datam: postea vero conventum est, ut per annum tantum firmitatem haberent, deinde statutum est, ut usque ad vitam fidelis produceretur*. Feudorum, lib. 1. tit. 1.

§ It was a kind of a precarious tenure, which the lord consented or refused to renew every year; as Cujas has observed.

CHAP. XIV.

Of the Military Service of Freemen.

TWO sorts of people were bound to military service; the great and lesser vassals, who were obliged in consequence of their fief; and the freemen, whether Franks, Romans, or Gauls, who served under the count, and were commanded by him and his officers.

The name of freemen was given to those, who on the one hand had no benefices or fiefs, and on the other were not subject to the base services of villainage; the lands they possessed were what they called allodial states.

The counts (a) assembled the freemen, and led them against the enemy; they had officers under them, who were called * vicars; and as all the freemen were divided into hundreds, which formed what was called a borough, the counts had also officers under them, who were called *centenarii*, and carried the freemen † of the borough, or their hundreds, to the field.

This division into hundreds is posterior to the establishment of the Franks in Gaul. It was made by Clotharius and Childebert, with a view of obliging each district to answer for the robberies committed in their division; this we find in the decrees || of those princes. A regulation of this kind is to this very day observed in England.

As the counts carried the freemen against the enemy, the feudal lords carried also their vassals or rear vassals; and the bishops, abbots, or their ‡ advocates, carried likewise theirs (b).

VOL. II.

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The

(a) See the capitulary of Charlemagne in the year 812. art. 3. and 4. edition of Baluzius, tom. 1. page 491. and the edict of Pistes in the year 864. art. 26. tom. 1. page 186.

* Et habeat unusquisque comes Vicarios & Centenarios secum, book 2. of the capitularies, art. 28.

† They were called Compagenes.

|| Published in the year 595. art. 1. See the capitularies, edition of Baluzius, page 20. These regulations were undoubtedly made by agreement.

‡ Advocati.

(b) Capitulary of Charlemagne in the year 812. art. 1. & 5. edition of Baluzius tom. i. page 490.

The bishops were greatly embarrassed, and (a) inconsistent with themselves; they requested of Charlemagne not to oblige them any longer to a military service; and when he had granted their request, they complained that he had deprived them of the public esteem; so that this prince was obliged to justify his intentions upon this head. Be that as it may, when they were exempted from marching against the enemy, I do not find that their vassals were led by the counts; on the contrary, we see (b) that the kings or the bishops chose one of their feudatories to conduct them.

In a capitulary (c) of Lewis the Pious, this prince distinguishes three sorts of vassals, those belonging to the king, those to the bishops, and those to the counts. The vassals † of a feudal lord were not led against the enemy by the count, except some employment in the king's household hindered the lord himself from leading them.

But who is it that led the feudal lords into the field? No doubt the king himself, who was always at the head of his faithful vassals. Hence we constantly find in the capitularies a distinction made * between the king's vassals and those of the bishops. Such brave and magnanimous princes as our kings, did not take the field to put themselves at the head of an ecclesiastical militia; these were not the men they chose to conquer or die with.

But

(a) See the capitulary of the year 803. published at Worms, edition of Baluzius, p. 408. and 410.

(b) Capitulary of Worms, in the year 803. edition of Baluzius, page 409. and the council in the year 845, under Charles the Bald, in *Verno palatio*, edition of Baluzius, tom. 2. page 17. art. 8.

(c) The 5th Capitulary of the year 819. art. 27. edition of Baluzius, page 618.

† De Vassis Dominicis, qui adhuc intra casam serviunt, & tamen beneficia habere noscuntur. statutum est, ut quicumque ex eis cum Domino Imperatore domi remanserint, vassallos suos catos secum non retineant; sed cum comite, cujus pagenses sunt, ire permittant. Second capitulary in the year 812. art. 7. edition of Baluzius, tom. 1. page 494.

* First Capitulary of the year 812. art. 5. de hominibus nostris, & episcoporum & abbatum, qui vel beneficia vel talia propria habent, &c. edition of Baluzius, tom. 1. page 490.

But these lords carried their vassals and rear-vassals with them; as we can prove by the capitulary †, in which Charlemagne ordains that every freeman, who has four manors either in his own property, or as a benefice from somebody else, should march against the enemy, or follow his lord. It is evident, that Charlemagne means, that the person who had a manor of his own should march under the count, and he who held a benefice of a lord should set out along with him.

And yet the abbe du Bos (a) pretends that, when mention is made in the capitularies of tenants who depended on a particular lord, no others are meant than bondmen: and he grounds his opinion on the law of the Visigoths, and the practice of that nation. It is much better to rely on the capitularies themselves; that which I have just quoted says expressly the contrary. The treaty between Charles the Bald and his brothers, takes notice also of freemen, who might chuse to follow either a lord or the king; and this regulation is conformable to a great many others.

We may therefore conclude, that there were three sorts of military services; that of the king's vassals, who had other vassals under them; that of the bishops, or of the other clergy, and their vassals; and, in fine, that of the count who commanded the freemen.

Not but the vassals might be also subject to the count; as those who have a particular command are subordinate to him, who is invested with a more general authority.

We even find that the count and the king's commissaries might oblige them to pay the fine, when they had not fulfilled the engagements of their fief.

In like manner, if the king's vassals (b) committed any outrage, they were subject to the correction of the count, unless they chose to submit rather to that of the king.

† In the year 812. chap. i. edition of Baluzius, page 490. *ut omnis homo liber, qui quatuor manfos vestitos de proprio suo, five de alicujus beneficio habet, ipse se præparet, & ipse in hostem pergat, five cum seniore suo.*

(a) Tom. 3. book 6. chap. 4. page 299. establishment of the French monarchy.

(b) Capitulary of the year 882, art. 11. *apud Venum palatium*, edition of Baluzius, tom. 2. page 289.

CHAP. XV.

Of the Double Service.

IT was a fundamental principle of the monarchy, that whosoever was subject to the military power of another person, was subject also to his civil jurisdiction. Thus the capitulary (a) of Lewis the Pious in the year 815, makes the military power of the count, and his civil jurisdiction over the freemen, keep always an equal pace. Thus the placita * of the count who carried the freemen against the enemy, were (b) called the placita of the freemen; from whence undoubtedly came this maxim, that the questions relating to liberty could be decided only in the count's placita, and not in those of his officers. Thus the count never led the vassals belonging to the bishops or to the abbots against the enemy, because they were not subject to the civil jurisdiction. Thus he never commanded the rear-vassals belonging to the king's vassals. Thus the glossary † of the English laws informs us, that those to whom ‡ the Saxons gave the name of *Coples*, were by the Normans called *counts*, or *companions*, because they shared the judiciary fines with the king. Thus we see, that at all times the duty of a vassal || towards his lord, was to bear arms §, and to try his peers in his court.

One of the reasons which produced this connexion between the judiciary right and that of leading the forces against the enemy,

(a) Art. 1. & 2. and the council in Verno palatio of the year 845. art. 8. edition of Baluzius tom. 2. page 17.

* Or affizes.

(b) Capitularies, book 4th of the collection of Ansegise, art. 57. and the 5th capitulary of Lewis the Pious in the year 819. art. 14. edition of Baluzius tom. i. page 615.

† It is to be found in the collection of William Lambard, de priscis Anglorum legibus.

‡ In the word Satrapia.

|| This is well explained by the affizes of Jerusalem, chapter 221. & 222.

§ The advowees of the church, advocati, were equally at the head of their placiti and of their militia.

enemy, was because the person who led them exacted at the same time the payment of the fiscal duties, which consisted in some carriage services due by the freemen, and in general in certain judiciary profits, of which we shall treat hereafter.

The lords had the right of administering justice in their fief, by the same principle as the counts had it in their counties. And indeed, the counties, in the several variations that happened at different times, always followed the variations of the fiefs; both were governed on the same plan, and by the same principles. In a word, the counts in their counties were lords, the lords in their feignories were counts.

Those have been mistaken who considered the counts as civil officers, and the dukes as military commanders. Both were equally civil * and military officers; the whole difference consisted in the duke's having several counts under him, though there were counts who had no duke over them, as we learn from Fredegarius (a).

It will be imagined perhaps that the government of the Franks must have been very severe at that time, since the same officers were invested with a military and civil power, nay, even with a fiscal power, over the subjects; which in the preceding books I have observed to be distinguishing marks of despotic authority.

But it is not to be believed that the counts pronounced judgment by themselves, and administered justice in the same manner as the bashaws do in Turkey; in order to judge affairs, they assembled a kind of assizes, where the principal men appeared.

In order to understand thoroughly what relates to the judicial proceedings, in the formulas, in the laws of the Barbarians, and in the capitularies, it is proper to observe that the functions of the count, of the Grafio or fiscal judge, and the Centenarius, were the same; that the judges, the Rathimburghers

* See the 8th formulary of Marculfus, book i. which contains the letters given to a duke, a patrician, or count; and invests them with the civil jurisdiction, and the fiscal administration.

(a) Chronicle, chapter 78. in the year 636.

ghers and the sheriffs, were the same persons under different names. These were the count's assistants, and were generally seven in number; and as he was obliged to have twelve persons to judge †, he filled up the number with the principal men ||.

But whoever had the jurisdiction, the king, the count, the Grafio, the Centenarius, the lords, or the clergy, they never judged alone: and this usage, which derived its origin from the forests of Germany, was still continued, even after the fiefs had assumed a new form.

With regard to the fiscal power, its nature was such, that the count could hardly abuse it. The rights of the prince, in respect to the freemen, were so simple, that they consisted only, as we have already observed, in certain carriages which were * demanded of them on some public occasions. And as for the judiciary rights, there were laws which prevented (a) misdeemeanors.

CHAP. XVI.

Of Compositions among the Barbarous Nations.

SINCE it is impossible to have any tolerable notion of our political law, unless we are thoroughly acquainted with the laws and manners of the German nations, I shall therefore stop here a while, in order to inquire into those manners and laws.

It appears by Tacitus, that the Germans knew only two capital crimes; they hanged traitors, and drowned cowards; these were

† See concerning this subject the capitularies of Lewis the Pious, added to the Salic law, art. 2. and the formula of judgments given by Du Cange in the word, boni homines.

|| Per bonos homines; sometimes there were none but principal men. See the appendix to the formularies of Marculfus, chap. 51.

* And some tolls on rivers, of which I have spoken already.

(a) See the law of the Ripuarians, tit. 89. and the law of the Lombards, book 2. tit. 52. §9.

were the only public crimes among those people. When a man † had injured another, the relations of the person injured took share in the quarrel, and the offence was cancelled by a satisfaction. This satisfaction was made to the person offended when capable of receiving it; or to the relations if they had been injured in common, or if by the decease of the party injured, the satisfaction had devolved to them.

In the manner mentioned by Tacitus, these satisfactions were made by the mutual agreement of the parties; hence in the codes of the barbarous nations these satisfactions are called compositions.

The law § of the Frisians is the only one I find that has left the people in this situation, in which every family at variance was in some measure in the state of nature, and in which being unrestrained either by a political or civil law, they might give loose to their revenge, till they had obtained satisfaction. Even this law was moderated; a regulation was made (a), that the person, whose life was sought after, should be unmolested in his own house, as also in going and coming from church, and from the court where causes were tried.

The compilers of the Salic laws cite (b) an ancient usage of the Franks, by which a person who had dug a corpse out of the ground in order to strip it, should be banished from society, till the relations had consented to his being re-admitted. And as before that time a prohibition was made to every one, even to his wife, not to give him a morsel of bread, or to receive him under their roof; such a man was in respect to others, and others in respect to him, in a state of nature, till an end was put to this state by a composition.

This

† *Suscipere tam inimicitias, seu patris seu propinqui, quam amicitias necesse est: nec implacabiles durant; luitur enim etiam homicidium certo armamentorum ac pecorum numero, recipitque satisfactionem universa domus.* Tacit. de morib. Germ.

§ See this law in the 2d title on murders; and Vulemar's addition on robberies.

(a) *Additio sapientum*, tit. 1. § 1.

(b) *Salic law*, tit 58. § 1. tit. 17. § 3.

This excepted, we find that the sages of the different barbarous nations thought of determining by themselves, what would have been too long and too dangerous to expect from the mutual agreement of the parties. They took care to fix the value of the compositions which the party injured was to receive. All those barbarian laws are in this respect most admirably exact; the several cases are minutely * distinguished, the circumstances are weighed, the law substitutes itself in the place of the person injured, and insists upon the same satisfaction as he himself would have demanded in cold blood.

By the establishing of those laws, the German nations quitted that state of nature, in which they seem to have lived in Tacitus's time.

Rotharis declares in the law of the Lombards (c) that he had increased the compositions anciently accustomed for wounds, to the end that the wounded person being fully satisfied, all enmities should cease. In fact, as the Lombards, from a very poor people, were grown rich by the conquest of Italy, the ancient compositions were become frivolous, and reconcilements were prevented. I do not question but this was the motive which obliged the other chiefs of the conquering nations to make the different codes of the laws now extant.

The principal composition was that which the murderer paid to the relations of the deceased. The difference of (d) stations produced a difference in the compositions: thus in the law of the Angli, there was a composition of six hundred sous for the murder of an *adeling*, two hundred for that of a freeman, and thirty for killing a bondman. The greatness therefore of the composition fixed on the life of a man, was one of his principal prerogatives; for beside the distinction it made of his person,

* The Salic laws are admirable in this respect; see especially the titles 2, 3, 4, 5, 6, and 7. which related to the stealing of cattle.

(c) Book i. tit. 7. § 15.

(d) See the law of the Angli, tit. i. § 1. 2. & 4. *ibid.* tit. 5. § 6. the law of the Bavarians, tit. i. chap. 8. & 9. and the law of the Frisians, tit. xv.

son, it likewise established a greater security in his favour among rude and violent nations.

This we are made sensible of by the law of the (e) Bavarians: it gives the names of the Bavarian families who received a double composition, because they were the first * after the Agilolfings. The Agilolfings were of the ducal race, and it was customary with that nation to chuse a duke out of that family; these had a quadruple composition. The composition for the duke exceeded by a third that which had been established for the Agilolfings: *because he is a duke, says the law, a greater honour is paid to him than to his relations.*

All these compositions were valued in money. But as those people, especially when they lived in Germany, had very little specie, they might pay it in cattle, corn, moveables, arms, dogs, hawks †, lands, &c. Very often the law itself ‖ determined the value of those things; which explains how it was possible for them to have such a number of pecuniary punishments with so very little money.

These laws were therefore employed in determining exactly the difference of wrongs, injuries, and crimes; to the end that every one might know precisely how far he had been injured or offended, the reparation he was to receive, and especially that he was to receive no more.

In this light it is easy to conceive, that a person who had taken revenge, after having received satisfaction, was guilty of a very great crime. This crime contained a public, as well as a private offence; it was a contempt of the law itself; a crime which the legislators ‡ never failed to punish.

VOL. II.

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(e) Tit. ii. chap. 20.

* Hozidra, Ozza, Sagana, Habilingua, Aniena. Ibid.

† Thus the law of Ina valued life by a certain sum of money, or by a certain portion of land. *Leges Inæ regis, titulo de villico regio, de prisicis Anglorum legibus.* Cambridge 1644.

‖ See the law of the Saxons, which makes the same regulation for several people, chap. 18. See also the law of the Ripuarians tit. 36. § 11. the law of the Bavarians, tit. 1. § 10. 11. *Si aurum non habet donet aliam pecuniam, mancipia, terram, &c.*

‡ See the law of the Lombards, book i. tit. 25. § 21. *ibid.* book i. tit. 9. § 8. & 34. *ibid.* § 38. and the capitulary of Charlemagne in the year 802. chap. 32. containing an instruction given to those whom he sent into the provinces.

There was another crime, which above all others was considered as dangerous †, when those people lost something of their spirit of independence, and when the kings endeavoured to establish a better civil administration: this was the refusing to give or to receive satisfaction. We find in the different codes of the laws of the Barbarians, that the legislators obliged ‡ them to it. In fact, a person who refused to receive satisfaction, wanted to preserve his right of revenge; he who refused to give it, left the right of taking revenge to the person injured; and this is what the sages had reformed in the institutions of the Germans, whereby people were invited but not compelled to compositions.

I have just now made mention of a text of the Salic law, in which the legislator left the party offended at liberty to receive or to refuse satisfaction; it is this law * by which a person who had stripped a dead body was expelled from society, till the relations upon receiving satisfaction petitioned for his being re-admitted. It was owing to the respect they had for sacred things, that the compilers of the Salic laws did not meddle with the ancient usage.

It would have been absolutely unjust to grant a composition to the relations of a robber killed in the fact, or to the relations of a woman who had been repudiated for the crime of adultery. The law (a) of the Bavarians allowed no composition in the like cases, but punished the relations who sought for revenge.

It

† See in Gregory of Tours, book vii. chap. 47. the detail of a process wherein a party loses half the composition that had been adjudged to him, for having done justice to himself, instead of receiving satisfaction, whatever injury he might have afterwards received.

‡ See the law of the Saxons, chap. 3. & 4. the law of the Lombards, book i. tit. 37. § 1. & 2. and the law of the Allemans, tit. 45. § 1. & 2. This last law gave leave to the party injured to right himself upon the spot, and in the first transport of passion. See also the capitularies of Charlemagne in the year 779, chap. 22. in the year 802. chap. 32. and also that of the year 805. chap. 5.

* The compilers of the law of the Ripuarians seem to have softened this. See the 85th title of those laws.

(a) See the decree of Tassillon, de popularibus legibus, art. 3. 4. 10. 16. 19. the law of the Angli, tit. 7. § 4.

It is no rare thing to meet with compositions for involuntary actions in the codes of the laws of the Barbarians. The law of the Lombards is generally very prudent; it (b) ordained, that in those cases the compositions should be according to the person's generosity; and that the relations should no longer be permitted to pursue their revenge.

Clotharius the second made a very wise decree: he forbade the person (c) robbed to receive any clandestine composition, and without an order from the judge. We shall see presently the motive of this law.

CHAP. XVII.

Of what was afterwards called the Jurisdiction of the Lords.

BESIDES the composition which they were obliged to pay to the relations for murders, or injuries, they were also under a necessity of paying a certain duty, which the codes of the barbarous laws call † *fredum*. We have no term in our modern languages to express it; yet I intend to treat of it at large; and in order to give an idea of it, I begin with defining it a recompence for the protection granted against the right of revenge.

The administration of justice among those rude and unpolished nations, was nothing more than granting to the person who had committed an offence, a protection against the revenge of the party offended, and obliging the latter to accept of the satisfaction due to him: insomuch that among the Germans, contrary to the practice of all other nations, justice was administered in order to protect the criminal against the party injured.

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(b) Book 1. tit. ix. § 4.

(c) Pactus pro tenore pacis inter Childebertum & Clotarium, anno 593, & decretio Clotarii II. regis, circa annum 595. chap. 11.

† When it was not determined by law, it was generally the third of what was given for the composition, as appears in the law of the Ripuarians, chap. 89. which is explained by the third capitulary of the year 813. Edition of Baluzius, tom. 1. p. 512.

The codes of the Barbarian laws have given us the cases in which these *freda* might be demanded. When the relations could not prosecute, they allowed of no *fredum*; in fact, when there was no prosecution, there could be no composition for a protection against it. Thus, in the law of the (a) Lombards, if a person happened to kill a freeman by chance, he paid the value of the man killed, without the *fredum*; because, as he had killed him involuntarily, it was not the case in which the relations were allowed the right of revenge. Thus in the law of the (b) Ripuarians, when a man was killed with a piece of wood, or with any instrument made by man, the instrument or the piece of wood was deemed culpable, and the relations seized upon them for their own use, but were not allowed to demand the *fredum*.

In like manner, when a beast happened to kill a man, the (c) same law established a composition without the *fredum*, because the relations of the deceased were not offended.

In fine, it was ordained by the (d) Salic law, that a child who had committed a fault before the age of twelve, should pay the composition without the *fredum*: as he was not yet able to bear arms, he could not be in the case in which the party injured, or his relations, had a right to demand satisfaction.

It was the criminal that paid the *fredum* for the peace and security, of which he had been deprived by his crime, and which he might recover by protection. But a child did not lose this security; he was not a man, and consequently could not be expelled from human society.

This *fredum* was a local right in favour of the person who was * judge of the district: Yet the law of the Ripuarians (a) forbade

(a) Book i. tit. 9. §. 17. edition of Lindembrock.

(b) Tit. 70.

(c) Tit. 46. See also the law of the Lombards, book i. chap. 21. §. 3. Lindembrock's edition, si caballus cum pede, &c.

(d) Tit. 28. §. 6.

* As appears by the decree of Clotharius II. in the year 595. *fredus tamen iudici in cuius pago est reservetur.*

(a) Tit. 89.

forbad him to demand it himself; it ordained, that the party who had gained the cause should receive it and carry it to the exchequer, to the end that there might be an eternal peace, says the law, among the Ripuarians.

The greatness of the *fredum* was proportioned to the greatness of the † protection: thus the *fredum* for the king's protection was greater than what was granted for the protection of the count, or of the other judges.

Here I see the origin of the jurisdiction of the lords. The fiefs comprized very large territories, as appears from a vast number of records. I have already proved that the kings raised no taxes on the lands belonging to the division of the Franks; much less could they reserve to themselves any duties on the fiefs. Those who obtained them, had in this respect a full and perfect enjoyment, reaping every fruit and possible emolument from them. And as one of the most considerable ‡ emoluments was the judiciary profits (*freda*), which were received according to the usage of the Franks, it followed from thence, that the person seized of the fief, was also seized of the jurisdiction, the exercise of which consisted of the compositions made to the relations, and of the profits accruing to the lord; it was nothing more than ordering the payment of the compositions of the law, and demanding the law fines.

We find by the formularies containing a confirmation of the perpetuity of a fief in favour of a feudal lord (a), or of the privileges of fiefs in favour of (b) churches, that the fiefs were possessed of this right. This appears also from an infinite number of

† Capitulare incerti anni, chap. 57. in Baluzius, tom. i. page 515. and it is to be observed, that what was called *fredum* or *faida*, in the monuments of the first race, is called by the name of *bannum* in those of the second race, as appears from the capitulary de partibus Saxonise, in the year 789.

‡ See the capitulary of Charlemagne, de villis.

(a) See the 3d, 8th, and 17th formula, book i. of Marculfus.

(b) See the 2d, 3d, and 4th formula of Marculfus, book i.

of charters (c) containing a prohibition of the king's judges or officers, of entering upon the territory in order to exercise any act of judicature whatsoever, or to demand any judiciary emolument. When the king's judges could no longer demand any thing in a district, they never entered it; and those to whom this district was left, exercised the same functions as had been exercised before by the judges.

The king's judges are forbidden also to oblige the parties to give security for their appearing before them: it belonged therefore to the person who had received the territory in fief, to demand this security. They mentioned also, that the king's commissaries shall no longer insist upon being accommodated with a lodging; in effect, they no longer exercised any function in those districts.

The administration therefore of justice, both in the old and new fiefs, was a right inherent in the very fief itself, a lucrative right which constituted a part of it. For this reason it has been considered at all times in this light; from whence this maxim arose, that jurisdictions are patrimonial in France.

Some have thought that the jurisdictions derived their origin from the manumissions made by the kings and lords in favour of their bondmen. But the German nations, and those descended from them, are not the only people who manumitted their bondmen, and yet they are the only people that established patrimonial jurisdictions. Besides, we find by the formularies * of Marculfus that there were freemen dependent on these jurisdictions in the earliest times: the bondmen were therefore subject to the jurisdiction, because they were upon the territory; and they did not give rise to the fiefs for having been comprised in the fief.

Others

(c) See the collections of those charters, especially that at the end of the 5th volume of the historians of France, published by the Benedictine monks.

* See the 3d, 4th, and 14th of the first book, and the charter of Charlemagne, in the year 771. in Martenne, tom. i. Anecd. collect. 11. *præcipientes jubemus, ut nullus iudex publicus homines ipsius ecclesiæ et monasterii ipsius Morbacensis, tam ingenuos quam et servos, & qui super eorum terras manere, &c.*

Others have taken a shorter cut: the lords, say they, and this is all they say, usurped the jurisdictions. But are the nations descended from Germany the only people in the world that usurped the rights of princes? We are sufficiently informed by history, that several other nations have encroached upon their sovereigns, and yet we find no other instance of what we call the jurisdiction of the lords. The origin of it is therefore to be traced in the usages and customs of the Germans.

Whoever has the curiosity to look into Loyseau (a), will be surprised at the manner in which this author supposes the lords to have proceeded, in order to form and usurp their different jurisdictions. They must have been the most cunning people in the world; they must have robbed and plundered, not after the manner of a military people, but as the judges of a village and the attornies rob one another. Those brave warriors must be said to have formed throughout all the particular provinces of the kingdom, and in so many kingdoms, a general system of politics: Loyseau makes them reason as he himself reasoned in his closet.

Once more: if the jurisdiction was not a dependance of the fief, how come we every where (b) to find, that the service of the fief was to attend the king or the lord both in their courts and in the army?

CHAP. XVIII.

Of the Territorial Jurisdiction of the Churches.

THE churches acquired a very considerable property. We find that our kings gave them great seigniories, that is, great fiefs; and we find jurisdictions established at the same time in the demesnes of those churches. From whence could
so

(a) Treatise of village jurisdictions. -

(b) See Mons. du Cange on the word *hominium*.

so extraordinary a privilege derive its origin? It must certainly have been in the nature of the thing given; the church land had this privilege, because it had not been taken from it. A feigniory was given to the church; and it was allowed to enjoy the same privileges, as if it had been given to a vassal. It was also subjected to the same service as it would have paid to the state if it had been granted to a layman, according to what we have already observed.

The churches had therefore the right of demanding the payment of compositions in their territory, and of insisting upon the *fredum*; and as those rights necessarily implied that of hindering the king's officers from entering upon the territory, to demand these *freda*, and to exercise acts of judicature, the right which the ecclesiastics had of administering justice in their own territory, was called *immunity* in the style of the formularies (a) of the charters, and of the capitularies.

The law of the Ripuarians * forbids the freedmen † of the churches, to hold the assembly ‡ for administering justice in any other place than in the church where they were manumitted. The churches had therefore jurisdictions even over freemen, and held their *placita* in the earliest times of the monarchy.

I find in the lives of the saints (b), that Clovis gave to a certain holy person a power over a district of six leagues, and exempted it from all manner of jurisdiction. This, I believe, is a falsity, but it is a falsity of a very ancient date; both the truth and the fiction contained in that life are relative to the customs

* Ne alicubi, nisi ad ecclesiam ubi relaxati sunt, mallum teneant, tit. 58. §. 1. See also §. 19. Lindembrock's edition.

† Tabulariis.

‡ Mallum.

(a) See the third and fourth formulary of Marculfus, book i.

(b) Vita S. Germeri Episcopi Tolosani, apud Bollandianos, 16 Maii.

customs and laws of those times, and it is these customs (c) and laws we are investigating.

Clotharius II. orders || the bishops or the nobility who are possessed of estates in distant parts, to chuse upon the very spot those who are to administer justice, or to receive the judiciary emoluments.

The same prince (a) regulates the judiciary power between the ecclesiastic courts and his officers. The capitulary of Charlemagne in the year 802 prescribes to the bishops and abbots, the qualifications necessary for their officers of justice. Another capitulary (b) of the same prince inhibits the royal officers to exercise any jurisdiction over * those who are employed in manuring church lands, except they entered into that state by fraud, and to exempt themselves from contributing to the public charges. Another † ordains that the churches should have both criminal and civil jurisdiction over those who live upon their lands. In fine, as the capitulary (c) of Charles the Bald distinguishes between the king's jurisdiction, that of the lords, and that of the church; I shall say nothing further ‡ upon this subject.

VOL. II.

T t

CHAP.

(c) See also the life of St Melanius, and that of St Deicola.

|| In the council of Paris, in the year 615. *Episcopi vel potentes, qui in aliis possident regionibus, iudices vel missos discussores de aliis provinciis non instituunt, nisi de loco qui iustitiam percipiant & aliis reddant.* art. 19. see also the 12th art.

(a) Ibid. art 5.

(b) In the law of the Lombards book 2. tit. 44. chap. 2. Lindembrock's edition.

* *Servi Aldiones, libellarii antiqui, vel alii noviter facti.* Ibid.

† A capitulary of the year 806; it is added to the law of the Bavarians, art. 7. See also the 3d art. Lindembrock's edition, page 444. *Imprimis omnium iubendum est, ut habeant ecclesiæ earum iustitias, & in vita illorum qui habitant in ipsis ecclesiis, & post tamen pecuniis quam et in substantiis earum.*

(c) In the year 857, in synodo apud Carisiacum, art. 4. edition of Baluzius, page 96.

‡ See the letter written by the bishops assembled at Rheims in the year 858, art. 7. in the capitularies, Baluzius's edition, page 108. *Sicut illæ res & facultates in quibus vivunt clerici, ita et illæ sub consecratione immunitatis sunt de quibus debent militares vassalli, &c.*

CHAP. XIX.

That the Jurisdictions were established before the end of the Second Race.

IT has been pretended that the vassals usurped the jurisdiction in their feignories, during the disorders of the second race. Those who chuse rather to form a general proposition than to examine it, found it easier to say that the vassals did not possess, than to discover how they came to possess. But the jurisdictions do not owe their origin to usurpations; they are derived from the primitive establishment, and not from its corruption.

"He who kills a freeman," says (a) the law of the Bavarians, "shall pay a composition to his relations, if he has any; if not, he shall pay it to the duke, or to the person under whose protection he had put himself in his lifetime." It is well known what it was to put one's self under the protection of another for a benefice.

"He who has been robbed of his bondmen," says the law of the Allemans (b), "shall have recourse to the prince to whom the robber is subject; to the end that he may obtain a composition."

"If a centenarius," says * the decree of Childebert, "finds a robber in another hundred than his own, or in the limits of our faithful vassals, and does not drive him out, he shall represent the robber, or purge himself by oath." There was therefore a difference between the district of the centenarii and that of the vassals.

This

(a) Tit. 3. chap. 13. Lindembrock's edition.

(b) Tit. 85.

* In the year 595. art. 11. and 12. edition of the capitularies by Baluzius, page 19. *Pari conditione convenit, ut si una centena in alia centena vestigium secuta fuerit & invenerit, vel in quibuscunque fidelium nostrorum terminis vestigium miserit, & ipsum in aliam centenam minime expellere potuerit, aut convicius reddat latronem, &c.*

This decree † of Childebert explains the constitution of Clotharius in the same year, which being given for the same case and fact, differs only in the terms; the constitution calling *in truste*, what by the decree is called *in terminis fidelium nostrorum*. Messrs Bignon and Ducange (z), who pretend that *in truste* signified another king's demesnes, are mistaken in their conjecture.

But, to finish the dispute at once, the second race was neither in disorder nor in its decline under Charlemagne; during his reign there were no usurpations. If then the patrimonial jurisdictions were established in his time, this convenient system falls of itself to the ground.

Pepin, king of Italy, in a constitution * that had been made as well for the Franks as for the Lombards, after imposing penalties on the counts and other royal officers for prevarications or delays in the administration of justice, ordains †, that if it happens that a Frank or a Lombard possessed of a fief is unwilling to administer justice, the judge to whose district he belongs, shall suspend the exercise of his fief, and in the mean time, either the judge or his commissary shall administer justice.

It appears by a capitulary (a) of Charlemagne, that the kings did not levy the *freda* in all places. Another (b) capitulary of the same prince repeals several articles of the Salic, Burgundian, and Roman law, to the end that his ‡ vassals may observe an

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uniformity

† Si vestigium comprobatur latronis, tamen presentia nihil longe multando; aut si persequens latronem suum comprehenderit, integram sibi compositionem accipiat. Quod si in *truste* invenitur, medietatem compositionis *trustis* adquirat, & capitale exigat a latrone, &c.

(z) See the Glossary on the word *Trustis*.

* Inserted in the law of the Lombards, book 2. tit. 52. § 14. it is the capitulary of the year 793. in Baluzius, page 544. art. 10.

† Et si forsitan Francus aut Longobardus habens beneficium justitiam facere noluerit, ille judex in cujus ministerio fuerit, contradicat illi beneficium suum, interim dum ipse aut missus ejus justitiam faciat. See also the same law of the Lombards, book 2. tit. 52. § 2. which relates to the capitulary of Charlemagne in the year 779. art. 21.

(a) The third of the year 812. art. 10.

(b) The second of the year 813. Baluzius' edition.

‡ Ut unusquisque fidelis justitias ita faceret. Ibid.

uniformity in the administration of justice. By another (c) of the same prince we find the feudal laws and feudal court already established. Another of Lewis the Pious ordains, that when a person possessed of a fief does not administer justice ||, or hinders it from being administered, the king's commissaries shall live upon him at discretion, till justice be administered. I shall likewise quote two § capitularies of Charles the Bald, one of the year 861, where we find the particular jurisdictions established, with judges and subordinate officers; and the other * of the year 864, where he makes a distinction between his own feignories and those of private people.

We have not the original grants of the fiefs, because they were established by the division which is known to have been made among the conquerors. It cannot therefore be proved by original contracts, that the jurisdictions were at first annexed to the fiefs; but if in the formularies of the confirmations, or of the translations of those fiefs in perpetuity, we find, as already has been observed, that the jurisdiction was there established, this judiciary right must certainly have been inherent in the fief, and one of its chief prerogatives.

We have a far greater number of records that establish the patrimonial jurisdiction of the clergy in their districts, than we have to prove that of the benefices or fiefs of the feudal lords; for which there are two reasons. The first, that most of the records now extant were preserved or collected by the monks,
for

(c) The second capitulary of the year 813.

|| Capitulare quintum anni 819. art. 23. Baluzius's edition, page 617. *Ut ubicunque missi, aut episcopum, aut abbatem, aut alium quemlibet honore præditum invenerint, qui iustitiam facere noluit vel prohibuit, de ipsius rebus vivant quamdiu in eo loco iustitias facere debent.*

§ Edictum in Carisiaco in Baluzius, tom. 2. page 152. *unusquisque advocatus pro omnibus de sua advocazione—in convenientia, ut cum ministerialibus de sua advocazione quos invenerit contra hunc bannum nostrum fecisse—castiget.*

* Edictum Pistenfe, art. 18. Baluzius's edition, tom. 2. page 181. *Si in fiscum nostrum, vel in quamcunque immunitatem, aut alicujus potentis potestatem vel proprietatem confugerit, &c.*

for the use of their monasteries. The second, that the patrimony of the several churches having been formed by particular grants, and by a kind of exception to the order established, they were obliged to have charters granted to them; whereas the concessions made to the feudal lords, being consequences of the political order, they had no occasion to demand, and much less to preserve a particular charter. Nay, the kings were oftentimes satisfied with making a simple delivery with the sceptre, as appears by the life of St Maur.

But the third formulary † of Marculfus sufficiently proves, that the privilege of immunity, and consequently that of jurisdiction, were common to the clergy and the laity, since it is made for both.

CHAP. XX.

General idea of the Abbe Du Bos's Book on the establishment of the French Monarchy in Gaul.

BEFORE I finish this book, it will not be improper to inquire a little into the abbe du Bos's work, because my notions are perpetually contrary to his; and if he has hit on the truth, I must have missed it.

This work has imposed upon a great many people, because it is written with a vast deal of art; because the point in question is constantly supposed; because the more it is deficient in proofs, the more it abounds in probabilities; and, in fine, because an infinite number of conjectures are laid down as principles, and from thence other conjectures are inferred as consequences. The reader forgets he has been doubting, in order to begin to believe. And as a prodigious fund of erudition is interspersed, not in the system, but around it, the mind is taken up with the appendages, and neglects the principal. Besides, such a vast multitude

† Lib. 1. Si beneficia opportuna locis ecclesiarum, aut cui voluerit dicere.

multitude of researches hardly permit one to imagine that nothing has been found ; the length of the way makes us think that we are arrived at our journey's end.

But when we examine thoroughly, we find an immense colossus with earthen feet ; and it is the earthen feet that render the colossus immense. If the abbe du Bos's system had been well grounded, he would not have been obliged to write three huge volumes to prove it ; he would have found every thing within his subject ; and without wandering on every side in quest of what was extremely foreign to it, even reason itself would have undertaken to range this in the same chain with the other truths. Our history and laws would have told him, " Do not take so much trouble, we shall be your vouchers."

The abbe du Bos endeavours by all means to explode the received opinion that the Franks made the conquest of Gaul. According to his system, our kings were invited by the people, and only substituted themselves in the place, and succeeded to the rights of the Roman emperors.

This pretension cannot be applied to the time when Clovis, upon his entering Gaul, took and plundered the towns ; neither is it applicable to the time when he defeated Syagrius the Roman commander, and conquered the country which he held ; it can therefore be referred only to the time when Clovis, already master of a great part of Gaul by open force, was called by the choice and affection of the people to the sovereignty over the rest of the country. And it is not enough that Clovis was received, he must have been called ; the abbe du Bos must prove, that the people chose rather to live under Clovis, than under the domination of the Romans, or under their own laws. Now the Romans belonging to that part of Gaul not yet invaded by the Barbarians, were, according to this author, of two sorts ; the first were of the Armorican confederacy, who had driven away the Emperor's officers, in order to defend themselves against the Barbarians, and to be governed by their own laws ; the second were subject to the Roman officers. Now, does this gentleman produce any convincing proof that
the

the Romans, who were still subject to the empire, called in Clovis? not one. Does he prove that the republic of the Armoricans invited Clovis, or even concluded any treaty with him? not at all. So far from being able to tell us the fate of this republic, he cannot even so much as prove its existence; and notwithstanding he pretends to trace it from the time of Honorius to the conquest of Clovis, notwithstanding he relates with a most admirable exactness all the events of those times; still this republic remains invisible in ancient authors. For there is a wide difference between proving by a passage of Zozyms (a), that under the Emperor Honorius, the * country of Armorica and the other provinces of Gaul revolted, and formed a kind of a republic; and shewing us, that notwithstanding the different pacifications of Gaul, the Armoricans always formed a particular republic, which continued till the conquest of Clovis: and yet this is what he should have shewn by strong and substantial proofs, in order to establish his system. For when we behold a conqueror entering a country, and subduing a great part of it by force and open violence, and soon after we find the whole country subdued, without any mention in history of the manner of its being effected, we have sufficient reason to believe that the affair ended as it began.

When we find he has mistaken this point, it is easy to perceive that his whole system falls to the ground; and as often as he infers a consequence from these principles, that Gaul was not conquered by the Franks, but that the Franks were invited by the Romans, we may safely deny it.

This author proves his principle, by the Roman dignities with which Clovis was invested; he insists that Clovis succeeded to Chilperic his father in the office of *magister militiæ*. But these two officers are merely of his own creation. St Remigius's letter

(a) Hist. lib. vi.

* *Totusque tractatus Armoricus aliæque Galliarum provinciæ.* Ibid.

ter to Clovis, on which he grounds his opinion (a), is only a congratulation upon his accession to the crown. When the intent of a writing is so well known, why should we give it another turn?

Clovis, towards the end of his reign, was made consul by the emperor Anastasius; but what right could he receive from an authority that lasted only one year? It is very probable, says our author, that in the same diploma the emperor Anastasius made Clovis proconsul. And I say, it is very probable he did not. With regard to a fact for which there is no foundation, the authority of him who denies, is equal to that of him who affirms. But I have also a reason for denying it. Gregory of Tours, who mentions the consulate, says not a word concerning the proconsulate; and even this proconsulate could have lasted only about six months. Clovis died a year and a half after he was made consul; and we cannot pretend to make the proconsulate an hereditary office. In fine, when the consulate, and, if you will, the proconsulate, were conferred upon him, he was already master of the monarchy, and all his rights were established.

The second proof alledged by the abbé du Bos, is the renunciation made by the emperor Justinian, in favour of the children and grand-children of Clovis, of all the rights of the empire over Gaul. I could say a great deal concerning this renunciation. We may judge of the regard shewn to it by the kings of the Franks, from the manner in which they performed the conditions of it. Besides, the kings of the Franks were masters, and peaceable sovereigns of Gaul; Justinian had not one foot of ground in that country; the western empire had been destroyed a long time before; and the eastern empire had no right to Gaul, but as representing the emperor of the west. These were rights to rights; the monarchy of the Franks was already founded; the regulation of their establishment was made; the reciprocal rights of the persons and of the different nations who lived in the monarchy, were agreed on; the laws of each nation

(a) Tom. 2, book 3, chap. 18. page 270.

tion were given, and even reduced into writing. What could therefore that foreign renunciation avail to a government already established?

What can the abbe du Bos mean by making such a parade of the declamations of all those bishops, who in the midst of the disorder, confusion, and total subversion of the state, as well as in the ravages of conquest, endeavour to flatter the conqueror? What else is implied by flattering, but the weakness of him who is obliged to flatter? What does rhetoric and poetry prove, but the use of those very arts? Is it possible to help being surprised at Gregory of Tours, who, after mentioning the assassinations committed by Clovis, says, that God laid his enemies every day at his feet, because he walked in his ways? Who doubts but the clergy were glad of Clovis's conversion, and that they even reaped great advantages from it; but who doubts, at the same time, that the people experienced all the miseries of conquest, and that the Roman government submitted to that of the Franks? The Franks were neither willing nor able to make a total change; and few conquerors were ever seized with so great a degree of madness. But to render all the abbe du Bos's consequences true, they must not only have made no change amongst the Romans, but they must have even changed themselves.

I could undertake to prove, by following this author's method, that the Greeks never conquered Persia. I would set out with mentioning the treaties which some of their cities concluded with the Persians; I would mention the Greeks who were in Persian pay, as the Franks were in the pay of the Romans. And if Alexander entered the Persian territories, besieged, took, and destroyed the city of Tyre, it was only a particular affair like that of Syagrius. But, behold the Jewish pontiff goes out to meet him. Listen to the oracle of Jupiter Hammon. Recollect how he had been predicted at Gordium. See what a number of towns croud, as it were, to submit to him; and how all the Satraps and grandees come to pay him obeisance. He

puts on the Persian dress ; this is Clovis's consular robe. Does not Darius offer him one half of his kingdom ? Is not Darius assassinated like a tyrant ? Do not the mother and wife of Darius weep at the death of Alexander ? Were Quintus Curtius, Arrian, or Plutarch, Alexander's contemporaries ? Has not the invention of * printing afforded us great lights, which those authors wanted ? Such is the history of the establishment of the French monarchy in Gaul.

CHAP. XXI.

Of the French Nobility.

THE abbe du Bos maintains, that at the commencement of our monarchy there was only one order of citizens among the Franks. This assertion, so injurious to the noble blood of our principal families, is equally affronting to the three great houses which successively governed this realm. The origin of their grandeur would not therefore be lost in oblivion, night, and time. History would point out the ages when they were common families ; and to make Childeric, Pepin, and Hugh Capet gentlemen, we should be obliged to trace their pedigree among the Romans or Saxons, that is, among the conquered nations.

This author grounds (a) his opinion on the Salic law. By this law, he says, it plainly appears, that there were not two different orders of citizens among the Franks ; it allowed a composition † of two hundred sous for the murder of any Frank whatsoever ; but among the Romans it distinguished the king's guest, for whose death it gave a composition of three hundred sous from the Roman proprietor to whom it granted a hundred, and

* See the preliminary discourse of the Abbe du Bos.

(a) See the establishment of the French monarchy, vol. 3. book 6. chap. 4. page 304.

† He cites the 44th title of this law, and the law of the Ripuarians, tit. 7. & 36.

and from the Roman tributary to whom it gave only a composition of forty-five. And as the difference of the compositions formed the principal distinction, he concludes that there was but one order of citizens among the Franks, and three among the Romans.

It is astonishing that his very mistake did not set him right. In fact, it would have been vastly extraordinary that the Roman nobility, who lived under the domination of the Franks, should have a larger composition, and been persons of much greater importance than the most illustrious among the Franks, and their greatest general. What probability is there, that the conquering nation should have so little respect for themselves, and so great a regard for the conquered people? Besides, our author quotes the laws of other barbarous nations, which prove that they had different orders of citizens. Now it would be very extraordinary indeed that this general rule should have failed only among the Franks; this ought to have made him conclude either that he did not rightly understand, or that he misapplied the passages of the Salic law; which is actually the case.

Upon opening this law, we find that the composition for the death of an Antrustio *, that is, of the king's vassal, was six hundred sous; and that for the death of a Roman who was the king's guest (a), was only three hundred. We find there that the (b) composition for the death of an ordinary Frank (c) was two hundred sous; and for the death of an ordinary Roman (d), only one hundred. For the death of a Roman (e) tributary, who was a kind of bondman or freedman, they paid a composition of forty-five sous; but I shall take no notice of this, no more than of the composition for the murder of a

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* Qui in truste dominica est. tit. 44. § 4. and this relates to the thirteenth formulary of Marculfus, de regis Antrustione. See also title 66. of the Salic law, § 3. & 4. and the title 74. and the law of the Ripuarians, tit. 11. and the capitulary of Charles the Bald apud Carisiacum, in the year 877. chap. 20.

(a) Salic law, tit. 44. § 6.

(b) Ibid. § 4.

(c) Tit. 44. § 1.

(d) Tit. 44. § 15.

(e) Salic law tit. 44. § 7.

Frank bondman or of a Frank freedman, because this third order of persons is out of the question.

What does our author do? He is quite silent in respect to the first order of persons among the Franks, that is, the article relating to the Antrustio's; and afterwards, upon comparing the ordinary Frank, for whose death they paid a composition of two hundred sous, with those whom he distinguishes under three orders among the Romans, and for whose death they paid different compositions, he finds that there was only one order of citizens among the Franks, and that there were three among the Romans.

As this Gentleman is of opinion that there was only one order of citizens among the Franks, it would have been lucky for him that there had been only one order also among the Burgundians, because their kingdom constituted one of the principal parts of our monarchy. But in their codes * we find three sorts of compositions, one for the Burgundians or Roman nobility, the other for the Burgundians or Romans of a middling condition, and the third for those of a lower rank in both nations. He has not quoted this law.

It is very extraordinary to see in what manner he evades (f) those passages which press him hard on all sides. If you speak to him of the grandees, lords, and nobility; these, he says, are mere distinctions of respect, and not of order; they are things of courtesy, and not prerogatives of law; or else, he says, those people belonged to the king's council; nay, they possibly might be Romans: but still there was only one order of citizens among the Franks. On the other hand, if you speak to him of some Franks of an inferior rank (g), he says they are bondmen;

* Si quis quolibet causa dentem optimati Burgundioni vel Romano nobili excusserit, solidis viginti quinque cogatur exolvere; de mediocribus personis ingenuis, tam Burgundionibus quam Romanis, si dens excussus fuerit, decem solidis componatur; de inferioribus personis, quinque solidis. Art. 1. 2. & 3. of tit. 26. of the law of the Burgundians.

(f) Establishment of the French monarchy, vol. 3. book 6. chap. 4. & 5,

(g) Ibid. chap. 5. p. 319. & 320.

men; and thus he interprets the decree of Childebert. But I must stop here a little, to enquire further into this decree. Our author has rendered it famous by availing himself of it in order to prove two things; the one (h) that all the compositions we meet with in the laws of the Barbarians, were only civil interests added to corporal punishments, which intirely subverts all the ancient records; the other, that all freemen were judged directly and immediately by the king (i), which is contradicted by an infinite number of passages and authorities that inform us of the (k) judiciary order of those times.

This decree, which was made in an assembly * of the nation, says, that if the judge finds a notorious robber, he must command him to be tied, in order to be carried before the king, *si Francus fuerit*; but if he is a weaker person (*debilior persona*), he shall be hanged on the spot. According to the abbe du Bos, *Francus* is a freeman, *debilior persona* is a bondman. I shall defer for a moment entering into the signification of the word *Francus*, and begin with examining what can be understood by these words, *a weaker person*. In all languages whatsoever, every comparative necessarily supposeth three terms, the greatest, the lesser, and the smallest. If none were here meant but freemen and bondmen, they would have said a bondman, and not a man of a lesser power. Wherefore *debilior persona* does not signify a bondman, but a person of a superior condition to a bondman. Upon this supposition, *Francus* cannot mean a freeman, but a powerful man; and this word is taken here in that acceptation, because among the Franks there were always men who had a greater power in the state, and

(h) Ibid. chap. 4. page 307. & 308.

(i) Ibid. page 309. and in the following chapter, page 319. & 320.

(k) See the 28th & 31st book of this work.

* Itaque colonia convenit & ita bannivimus, ut unusquisque judex criminofum latronem ut audierit, ad casam suam ambulet, & ipsum ligare faciat; ita ut si Francus fuerit, ad nostram presentiam dirigatur; & si debilior persona fuerit, in loco pendatur. Capitulary, of Balusius's edition, tom. 1. page 19.

and it was more difficult for the judge or count to chastise them. This explication agrees very well with a great number of capitularies, where we find the cases in which the criminals were to be carried before the king, and those in which it was otherwise.

We find in the life of Lewis the Pious (l) written by Tegan, that the bishops were the principal cause of the humiliation of this emperor, especially those who had been bondmen, and those who were born among the Barbarians. Tegan thus addresses Hebo, whom this prince had drawn from the state of servitude, and made archbishop of Rheims. "What recompence did the emperor receive from you for so many benefits? He made you a freeman, but did not ennoble you, because he could not give you nobility after having given you your liberty."

This discourse, which proves so strongly the two orders of citizens, does not at all confound the abbe du Bos. He answers thus (m): "The meaning of this passage is not that Lewis the Pious was incapable of introducing Hebo into the order of the nobility. Hebo, as archbishop of Rheims, must have been of the first order, superior to that of the nobility." But I leave the reader to judge, whether this be not the meaning of that passage; I leave him to judge whether there can be any question here concerning a precedency of the clergy over the nobility. "This passage proves only, continues the same writer (n), that the freeborn subjects were qualified as noblemen; in the common acceptation, noblemen and men who are free-born have for this long time signified the same thing." What! because some of our burghers have lately assumed the quality of noblemen, shall a passage of the life of Lewis the Pious be applied to this sort of people? "And perhaps, continues

(l) Chap. 43. & 44.

(m) Establishment of the French monarchy, vol. 3. book 6. chap. 4. page 3. & 6.

(n) Ibid.

(o) Ibid.

"nues he still, Hebo had not been a bondman among the Franks, but among the Saxons, or some other German nation, where the people were divided into several orders." Then, because of the abbe du Bos's *perhaps*, there must have been no nobility among the nation of the Franks. But he never applied a *perhaps* so badly. We have seen that Togan * distinguishes the bishops who had opposed Lewis the Pious, some of whom had been bondmen, and others of a barbarous nation. Hebo belonged to the first, and not to the second. Besides, I do not see how a bondman, such as Hebo, can be said to have been a Saxon or a German; a bondman has no family, and consequently no nation. Lewis the Pious manumitted Hebo; and as bondmen, after their manumission, embraced the law of their master, Hebo was become a Frank, and not a Saxon or German.

I have been hitherto acting offensively; it is now time to defend myself. It will be objected to me, that indeed the body of the Antrustio's formed a distinct order in the state from that of the freemen: but as the fiefs were at first precarious, and afterwards for life, this could not form a nobleness of descent, since the prerogatives were not annexed to an hereditary fief. This is the objection which induced Mr de Valois to think, that there was only one order of citizens among the Franks; an opinion which the abbe du Bos has borrowed of him, and which he has absolutely spoiled with so many bad arguments. Be that as it may, it is not the abbe du Bos that could make this objection. For after having given three orders of Roman nobility, and the quality of the king's guest for the first, he could not pretend to say, that this title was a greater mark of a noble descent than that of Antrustio. But I must give a direct answer. The Antrustio's or trusty men were not such,

* Omnes episcopi molesti fuerunt Ludovico; & maxime ii quos e servili conditione honoratos habebat, cum his qui ex barbaris nationibus ad hoc fastigium perducti sunt. De gestis Ludovici Pii, chap. 43. & 44.

such, because they were possessed of a fief, but they had a fief given them because they were Antrustio's, or trusty men. The reader may please to recollect what has been said in the beginning of this book. They had not at that time, as they had afterwards, the same fief: but if they had not that, they had another, because the fiefs were given on account of their birth, and because they were often given in the assemblies of the nation, and, in fine, because as it was the interest of the nobility to have them, it was likewise the king's interest to give them. These families were distinguished by their dignity of trusty men, and by the prerogative of being qualified to vow fealty for a fief. In the following book (a), I shall shew, that by the circumstances of time there were freemen, who were permitted to enjoy this great prerogative, and consequently to enter into the order of nobility. It was not so at the time of Gontram, and his nephew Childebert; but so it was at the time of Charlemagne. But though in that prince's reign the freemen were not incapable of possessing fiefs, yet it appears by the above-cited passage of Tegan, that the freedmen were absolutely excluded. Will the abbe du Bos (b), who carries us to Turkey, to give us an idea of the ancient French nobility; will he, I say, pretend that they ever complained in Turkey of the elevation of people of low birth to the honours and dignities of the state, as they complained under Lewis the Pious and Charles the Bald? There was no complaint of this kind under Charlemagne, because this prince always distinguished the ancient from the new families; which Lewis the Pious and Charles the Bald did not.

The public should not forget the obligation it has to the abbe du Bos for several excellent performances. It is by these works, and not by his history of the establishment of the French monarchy,

(a) Chap. 19.

(b) Establishment of the French monarchy, vol. 3. book 6. chap. 4. page 302.

narchy, we ought to judge of his merit. He fell into very great mistakes, because he had more in view the count of Boulainvilliers' work than his own subject.

From all these criticisms I shall draw only one reflection; if so great a man was mistaken, what ought I not to fear?

BOOK XXXI.

Theory of the Feudal Laws among the Franks, in the Relation they bear to the Revolutions of their Monarchy.

CHAP. I.

Changes in the Offices and in the Fiefs. Of the Mayors of the Palace.

THE counts at first were sent into their districts only for a year; but they soon purchased the continuation of their offices. Of this we have an example in the reign of Clovis's grand-children. A person named Peonius (a) was count in the city of Auxerre; he sent his son Mummolus with money to Gontram, to prevail upon him to continue him in his employment; the son gave the money for himself, and obtained the father's place. The kings had already begun to spoil their own favours.

Though by the laws of the kingdom the fiefs were precarious, yet they were not given nor taken away in a capricious

VOL. II.

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(a) Gregory of Tours, Book iv. chap. 42.

and arbitrary manner; nay, they were generally one of the principal subjects debated in the national assemblies. It is natural however to imagine that corruption had seized this, as well as the other article; and that the possession of the fiefs, like that of the counties, was continued for money.

I shall shew in the course of this book that, independently of the grants which the princes made for a certain time, there were others in perpetuity. The court wanted to revoke the grants that had been made: this occasioned a general discontent in the nation, and was soon followed with that revolution famous in the French history, whose first epoch was the amazing spectacle of the execution of Brunechild.

It appears at first extraordinary, that this queen, who was daughter, sister, and mother to so many kings, a princess to this very day famous for works worthy of an *Ædile* or a Roman *Proconsul*, born with an admirable genius for affairs, endowed with qualities so long respected, should see herself (a) of a sudden exposed to so tedious, so shameful and cruel a punishment, by a (b) king whose authority was but indifferently established in the nation; if she had not incurred that nation's displeasure for some particular cause. Clotharius reproached (c) her with the murder of ten kings; but two of them he had put to death himself: the death of some of the others was owing to chance, or to the villainy of another queen; and a nation that had permitted Fredegunda (d) to die in her bed, that had even opposed the punishment of her flagitious crimes, ought to have been very indifferent in respect to those of Brunechild.

She was put upon a camel, and led ignominiously through the army; a certain sign that she had given great offence to that army. Fredegarius relates that Protarius, Brunechild's favourite,

(a) Fredegarius's chronicle, chap. 43.

(b) Clotharius II. son of Chilperic, and father of Dagobert.

(c) Fredegarius's chronicle, chap. 44.

(d) See Gregory of Tours, book vii. chap. 31.

favourite, stripped the lords of their property, and filled the exchequer with the plunder; that he humbled the nobility, and that no person could be sure of continuing in any office or employment. The army conspired against him, and he was stabbed in his tent; but Brunechild, either by revenging his death, or by pursuing the same plan, became every day more odious to the nation.

Clotharius, ambitious of reigning alone, inflamed moreover with the most furious revenge, and sure of perishing if Brunechild's children got the upper hand, entered into a conspiracy against himself; and whether it was owing to ignorance, or to the necessity of his circumstances, he became Brunechild's accuser, and made a terrible example of that prince's.

Warnacharius had been the very soul of the conspiracy formed against Brunechild; being at that time mayor of Burgundy, he made * Clotharius consent that he should not be displaced while he lived. By this means the mayor could not longer be in the same case as the French lords before that time; and this authority began to render itself independent of the regal dignity.

It was Brunechild's unhappy regency which had exasperated the nation. As long as the laws subsisted in their full force, no one could complain for having been deprived of a fief, since the law did not bestow it upon him in perpetuity. But when fiefs came to be acquired by avarice, by bad practices and corruption, they complained of being deprived by irregular means of things that had been irregularly acquired. Perhaps, if the public good had been the motive of the revocation of these grants, nothing would have been said: but they made a shew of order, without concealing the corruption; the fiscal rights were claimed, in order to lavish the public treasure; and grants were no longer the reward or the encouragement of services. Brunechild, through a corrupt spirit, wanted to reform the abuses of the

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ancient

* Ibid. chap. 42. in the year 613. Sacramento a Clothario accepto re unquam viæ sue temporibus degradaretur.

ancient corruption. Her caprices did not proceed from weakness: the vassals and the great officers thinking themselves in danger, prevented their own, by her ruin.

We are far from having all the records of what was transacted in those days; and the writers of chronicles, who understood very near as much of the history of their time, as our country clowns know of ours, were extremely barren. And yet we have a constitution of Clotharius, given † in the council of Paris for the reformation of ‡ abuses, which shews that this prince put a stop to the complaints that had occasioned the revolution. On the one hand, he confirms all the grants that had been made or confirmed by the kings or his predecessors; and, on the other, he ordains that whatever had been taken from his vassals, should be restored to them.

This was not the only concession the king made in this council; he enjoined, that whatever had been innovated, in opposition to the privileges of the clergy, should be corrected *; and he moderated the influence of the court in the || elections of bishops. He even reformed the fiscal affairs; ordaining that all the new § census's should be abolished, and that they should not levy any toll established since the death of Gontram, Sigebert, and Chilperic; that is, he abolished whatever had been done during the regencies of Fredegunda and Brunehild. He forbade the driving of his cattle to graze in private people's grounds; and we shall presently see that the reformation was still more general, and extended even to civil affairs.

CHAP.

† Some time after Baunehild's execution, in the year 615. See Baluzius's edition of the capitularies, pag. 21.

‡ Quæ contra rationis ordinem acta vel ordinata sunt, ne in antea, quod avertat, divinitas contingant, disposuerimus, Christo præsule, per hujus edicti tenorem generaliter emendare. Ibid. art. 16.

† Et quod per tempora ex hoc prætermisum est, vel dehinc perpetualiter observetur.

|| Ita ut episcopo decedente in loco ipsius qui a Metropolitano ordinari debet cum principalibus, a clero & populo eligatur; & si persona condigna fuerit, per ordinationem principis ordinetur; vel certe si de palatio eligitur, per meritum personæ & doctrinæ ordinetur. Ibid. art. 1.

§ Ut ubicumque census novus impie additus est, emendetur, art. 8. 9. & 21.

CHAP. II.

How the Civil Government was reformed.

HITHERTO the nation had given marks of impatience and levity, in respect to the choice or conduct of her masters ; she had regulated their differences, and obliged them to come to an agreement amongst themselves. But now she did what before was quite unexampled ; she cast her eyes on her actual situation, examined the laws coolly, provided against their insufficiency, put a stop to violence, and moderated the regal power.

The masculine, bold, and insolent regencies of Fredegunda and Brunechild, had less surprised than warned the nation. Fredegunda had defended her villainies by new villainies ; she had justified her poisonings and assassinations by poisonings and assassinations ; and had behaved in such a manner that her outrages were rather of a private than a public nature. Fredegunda did more mischief : Brunechild threatened more. In this crisis, the nation was not satisfied with setting the feudal government to rights ; she was also determined to secure her civil government. For the latter was rather more corrupt than the former ; and this corruption was so much the more dangerous, as it was more ancient, and depended more in some measure on the abuse of manners than on that of laws.

The history of Gregory of Tours shews us, on the one hand, a fierce and barbarous nation ; and on the other, kings of as bad a character. These princes were bloody, unjust, and cruel, because all the nation were so. If Christianity seemed sometimes to soften them, it was only by the terror which this religion imprints on the guilty ; the church supported herself against them by the miracles and prodigies of her saints. The kings were not addicted to sacrilege, because they dreaded the punishments inflicted on sacrilegious people : but this excepted, they committed

committed either in their passion or in cool blood all manner of crimes and injustice, because in these the revengeful hand of the Deity did not appear so visible. The Franks, as I have already observed, bore with bloody kings, because they were fond of blood themselves; they were not affected with the wickedness and extortions of their princes, because this was their own character. There had been a great many laws established, but the king rendered them all useless, by a kind of letters called *precepts* *, which subverted those laws: these were in the nature of the rescripts of the Roman emperors, whether it be that our kings borrowed this usage of them, or derived it from their own natural disposition. We see in Gregory of Tours, how they committed murders in cool blood, and put the accused to death, who had not been so much as heard; they gave *precepts* † for illicit marriages; they gave them for transferring successions; they gave them for depriving relations of their rights; and they gave them, in fine, to qualify men to marry consecrated virgins. They did not indeed make laws of their own authority, but they suspended the execution of those that had been already made.

Clotharius's constitution redressed all these grievances; no one (a) could any longer be condemned without being heard; relations were made to succeed according to the order established by law; all *precepts* for marrying religious women were made null, and those who had obtained and made use of them were severely punished. We might know perhaps more exactly his determinations with regard to these *precepts*, if the thirteenth and the two next articles of this decree had not been lost through the injury of time. We have only the first words of this thirteenth article, ordaining that the *precepts* shall be observed, which cannot

* They were orders which the king sent to the judges to do or to tolerate things contrary to law.

† See Gregory of Tours, book iv. pag. 227. Both our history and the charters are full of this; and the extent of these abuses appears especially in Clotharius's constitution, inserted in the edition of the capitularies made to reform them. Baluzius's edition, pag. 7.

(a) Art. 6. 18. 22.

cannot be understood of those he had just abolished by the same law. We have another constitution (g) by the same prince, which is relative to his decree, and corrects in the same manner every article of the abuses of the *precepts*.

True it is that Baluzius finding this constitution without date, and without the name of the place where it was given, attributes it to Clotharius I. But I say it belongs to Clotharius II. for three reasons; 1. It says that the king will preserve the immunities † granted to the churches by his father and grandfather. What immunities could the churches receive from Childeric, grandfather of Clotharius I. who was not a christian, and who lived even before the foundation of the monarchy? But if we attribute this decree to Clotharius II. we shall find his grandfather to have been this very Clotharius I. who made immense donations to the church, with a view of expiating the murder of his son Cramne, whom he had ordered to be burnt, together with his wife and children.

2. The abuses redressed by this constitution were still subsisting after the death of Clotharius I. and were even carried to their highest extravagance during the weakness of Gontram's reign, the cruelty of that of Chilperic, and the execrable regencies of Fredegunda and Brunchild. Now is it possible that the nation could have borne with grievances so solemnly proscribed, without ever complaining of the continual repetition of those grievances? Is it possible, that she could forbear doing at that time what she did afterwards, when Childeric II. (a) renewing the old oppressions, she pressed (b) him to ordain that the law and customs should be complied with as formerly in judicial proceedings.

In

(g) In Baluzius's edition of the capitularies, tom. i. pag. 7.

† In the preceding Book I have made mention of these immunities, which were grants of judicial rights, and contained prohibitions to the regal judges to perform any function in the territory, and were equivalent to the erection or grant of a fief.

(a) He began to reign towards the year 679.

(b) See the life of St Leger.

In fine, as this constitution was made to redress grievances, it cannot relate to Clotharius I. since there were no complaints of this kind in his reign, and his authority was well established throughout the kingdom, especially at the time in which they place this constitution; whereas it agrees very well with the events which happened during the reign of Clotharius II. which produced a revolution in the political state of the kingdom. We must clear up history by the laws, and the laws by history.

CHAP. III.

Authority of the Mayors of the Palace.

I TOOK notice that Clotharius II. had promised not to deprive Warnacharius of his mayor's place during life. This revolution had another effect; before this time the mayor was the king's officer, but now he became the officer of the people; he was chosen before by the king, and now by the nation. Before the revolution Protarius had been made mayor by Theodoric, and * Landeric by Fredegunda; but (a) after that the mayors were chosen by the nation †.

We must not therefore confound, as some authors have done, these mayors of the palace with those who were possessed of this dignity before the death of Brunechild; the king's mayors with those of the kingdom. We see by the law of the Burgundians, that among them the office of mayor was not one of the (b) first in the state; nor was it one of the most eminent (c) under the first kings of the Franks.

Clotharius

* Instigante Brunechilde, Theodorico jubente, &c. Fredegarius, chap. 27. in the year 665.

(a) *Gesta regum Francorum*, chap. 36.

† See Fredegarius' chronicle, chap. 54. in the year 626. and his anonymous continuator, chap. 101. in the year 695. and chap. 105. in the year 715. *Aimoin*, book 4. chap. 15. *Eginbard*, life of Charlemagne, chap. 48. *Gesta regum Francorum*, chap. 45.

(b) See the law of the Burgundians in præfat. and the second supplement to this law, tit. 13.

(c) See Gregory of Tours, book 9. chap. 36.

Clotharius removed the apprehensions of those who were possessed of employments and fiefs; and when after the death of Warnacharius † he asked the lords assembled at Troyes, who is it they would put in his place; they cried out they would chuse no one, and petitioning for his favour, they intrusted themselves entirely into his hands.

Dagobert reunited the whole monarchy in the same manner as his father; the nation had a thorough confidence in him, and appointed no mayor. This prince finding himself at liberty, and elated by his victories, resumed Brunchild's plan. But this succeeded so ill, that the vassals of Austrasia let themselves || be beaten by the Sclavonians, and returned home; so that the marches of Austrasia were left in prey to the Barbarians.

He determined then to make an offer to the Austrasians, of resigning Austrasia to his son Sigebert, together with a treasure, and to put the government of the kingdom and of the palace into the hands of Cunibert bishop of Cologne, and of the duke Adalgisus. Fredegarius does not enter into the particulars of the conventions then made; but the king confirmed them all by charters, and * Austrasia was immediately secured from danger.

Dagobert finding himself near his end, recommended his wife Nentechildis, and his son Clovis, to the care of Æga. The vassals of Neustria and Burgundy chose (a) this young prince for their king. Æga and Nentechildis had the government of the palace; they restored whatever Dagobert had taken; and

VOL. II.

Y y

complaints

† Eo anno Clotarius cum proceribus & leudibus Burgundiæ Trecaffinis conjungitur; cum, eorum esset sollicitus, si vellent, jam Warnachario discesso, alium in ejus honoris gradum sublimare; sed omnes unanimiter denegantes se nequaquam velle majorem domus eligere, regis gratiam obnixè petentes, cum rege transfegere. Fredegarius's chronicle, chap. 54. in the year 626.

|| Istam victoriam quam Winidi contra Francos meruerunt, non tantum Sclavinorum fortitudo obtinuit, quantum dementatio Austrasiorum, dum se cernebant cum Dagoberto odium incurrisse, & assidue exspoliarentur. Fredegarius's chronicle, chap. 68. in the year 630.

* Deinceps Austrasii, eorum studio limitem, & regnum Francorum contra Winidos utiliter defensasce noscuntur. Fredegarius's chronicle, chap. 75. in the year 632.

(a) Fredegarius's chronicle, chap. 79. 80. 89.

complaints ceased in Neustria and Burgundy, as they had ceased before in Austrasia.

After the death of Æga, the queen, Nentechildis, engaged the lords of Burgundy to chuse Floachatus for their mayor. The latter dispatched letters to the bishops and chief lords of the kingdom of Burgundy, by which he promised to preserve their honours and dignities † for ever, that is, during life. He confirmed his word by oath. This is the period, at which ‡ the author of the treatise of the mayors of the palace fixes the administration of the kingdom by those officers.

Fredegarius being a Burgundian, has entered into a more minute detail, as to what concerns the mayors of Burgundy, at the time of the revolution of which we are speaking, than as to what relates to the mayors of Austrasia and Neustria. But the conventions made in Burgundy were, for the very same reasons, agreed to in Neustria and Austrasia.

The nation thought it safer to lodge the power in the hands of a mayor whom she chose herself, and to whom she might prescribe conditions, than in those of a king whose power was hereditary.

CHAP. IV.

Of the Genius of the Nation in regard to the Mayors.

A GOVERNMENT, in which a nation that had an hereditary king, chose a person who was to exercise the royal authority, seems very extraordinary : but independently of the circumstances

† Ibid. cap. 89. Floachatus cunctis ducibus a regno Burgundiæ seu & pontificibus, per epistolam etiam et sacramentis firmavit unicuique gradum honoris et dignitatem, seu et amicitiam, perpetuo conservare.

‡ Deinceps a temporibus Clodovei, qui fuit filius Dagoberti inclyti regis, pater vero Theodorici, regnum Francorum decidens, per majores domus cœpit ordinari. De majoribus domus regiæ.

cumstances of those times, I find that the notions of the Franks in this respect were derived from a higher source.

They were descended from the Germans, of whom Tacitus * says, that in the choice of their king they were determined by his nobility; and in that of their leader, by his valour. This gives us an idea of the kings of the first race, and of the mayors of the palace; the former were hereditary, the latter elective.

No doubt but those princes, who stood up in the assembly of the nation, and offered themselves as the conductors of an enterprise to such as were willing to follow them, united generally in their own person both the king's authority and the mayor's power. By their noble blood they had attained the royal dignity; and their valour having procured them several followers who pitched upon them for their leaders, this gave them the power of mayor. By the royal dignity our first kings presided in the courts and assemblies, and gave laws with the consent of those assemblies; by the dignity of duke or leader they entered upon expeditions, and commanded the armies.

In order to be acquainted with the genius of the primitive Franks in this respect, we have only to cast an eye on the conduct (a) of Argobastes, a Frank by nation, on whom Valentinian had conferred the command of the army. He shut the emperor up in his own palace; where he would not suffer any person whomsoever to speak to him concerning either civil or military affairs. Argobastes did at that time what was afterwards practised by the Pepins.

CHAP. V.

In what manner the Mayors obtained the command of the Armies.

AS long as the kings commanded their armies in person, the nation never thought of chusing a leader. Clovis and his

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four

* Reges ex nobilitate, duces ex virtute sumunt. De moribus Germanorum.

(a) See Sulpicius Alexander in Gregory of Tours, book 2.

four sons were at the head of the Franks, and led them on through a long series of victories. Theobald son of Theobert, a young, weak, and sickly prince, was the first (a) of our kings that confined himself to his palace: he refused to engage in an expedition in Italy against Narſes, and he had * the mortification to ſee the Franks chuſe themſelves two chiefs, who led them againſt the enemy. Of the four ſons of Clotharius I. Gontram † was the leaſt fond of commanding his armies; the other kings followed this example; and, in order to intruſt the command without danger into other hands, they conferred it upon ſeveral chiefs or dukes ‡.

Innumerable were the inconveniencies which thence aroſe; all diſcipline was loſt, no one would any longer obey. The armies were dreadful only to their own country; they were laden with ſpoils, before they had reached the enemy. Of theſe miſeries we have a very lively picture in Gregory of Tours (b). “How ſhall we be able to obtain a victory,” ſaid Gontram (c), “we who do not ſo much as to keep what our “anceſtors acquired? Our nation is no longer the ſame. . . .” Strange, that it ſhould be on the decline ſo early as the reign of Clovis’s grandchildren.

It was therefore natural that they ſhould be determined at laſt upon an only duke, a duke who was to be veſted with an authority over this prodigious multitude of feudal lords and vaſſals, who were now become ſtrangers to their own engagements;

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(a) In the year 552.

* Leutharis vero et Butilinus, tametſi id regi ipſorum minime placebat, belli cum eis ſocietatem inierunt. Agathias, book i. Gregory of Tours, book iv. chap. 9.

† Gontram did not even march againſt Gondovald, who ſtiled himſelf ſon of Clotharius, and claimed his ſhare of the kingdom.

‡ Sometimes to the number of twenty. See Gregory of Tours, book v. chap. 27. book viii. chap. 18. and 30. book x. chap. 3. Dagobert, who had no mayor in Burgundy, obſerved the ſame policy, and ſent againſt the Gaſcons ten dukes, and ſeveral counts who had no dukes over them. Fredegarius’s chronicle, chap. 78. in the year 636.

(b) Gregory of Tours book viii, chap. 30. and book x. chap 3. Ibid. book 8, chap. 30.

(c) Ibid.

a duke who was to establish the military discipline, and to put himself at the head of a nation unhappily practised in making war against itself. This power was conferred on the mayors of the palace.

The original function of the mayors of the palace, was the management of the king's household. They had afterwards, in conjunction (b) with other officers, the political government of the fiefs; and at length they obtained the sole disposal of them. They had also the administration of military affairs and the command of the armies; and these two employments were necessarily connected with the other two. In those days it was much more difficult to raise than to command the armies; and who but the dispenser of favours could have this authority? In this martial and independent nation, it was prudent to invite, rather than to compel; prudent to give away or to promise the fiefs that should happen to be vacant by the death of the possessor; prudent, in fine, to reward continually, and to cause preferences to be dreaded. It was therefore right, that the person who had the superintendancy of the palace, should also be general of the army.

CHAP. VI.

Second Epocha of the Humiliation of our Kings of the first Race.

AFTER the execution of Brunechild, the mayors were administrators of the kingdom under the Kings; and though they had the management of the war, yet the kings were always at the head of the armies, and the mayor and the nation fought under their command. But the victory of duke Pepin over Theodoric and his mayor, compleated* the degradation of our

(b) See the second supplement to the law of the Burgundians, tit. 13. and Gregory of Tours, book 9. chap. 36.

* Illis quidem nomina regum imponens, ipse totius regni habens privilegium, &c. *Annals of Metz*, in theyear 695.

our kings ; and that which Charles Martel obtained over Chilperic and his mayor Rainfroy, confirmed it. Aufrasia triumphed twice over Neustria and Burgundy ; and the mayoralty of Aufrasia being annexed as it were to the family of the Pepins, this mayoralty and family became greatly superior to all the rest. The conquerors were then afraid lest some person of credit should seize the king's person, in order to excite disturbances. For this reason they kept † them in the royal palace as in a kind of prison, and once a-year they shewed them to the people. There they made ordinances, but ‡ these were such as were dictated by the mayor ; they answered ambassadors, but the mayors made the answers. This is the time mentioned by || historians of the government of the mayors over the kings whom they held in subjection.

The extravagant passion of the nation for Pepin's family went so far, that they chose one of his grandsons who was yet an § infant for mayor ; they put him over one Dagobert, that is, one phantom over another.

CHAP. VII.

Of the great Offices and Fiefs under the Mayors of the Palace.

THE mayors of the palace were far from reviving the precariousness of posts and employments ; for indeed their power was owing to the protection which in this respect they had granted

† Sedemque illi regalem sub sua ditione concessit. Ibid. anno 719.

‡ Ex chronico Centulesi, lib. ii. ut responsa quæ erat edoctus, vel potius jussus, ex sua velut potestate, redderet.

|| Annals of Metz, anno 691. Anno principatus Pippini super Theodoricum.—Annals of Fuld, or of Laurishan, Pippinus dux Francorum obtinuit regnum Francorum per annos 27. cum regibus sibi subiectis.

§ Posthæc Theodealdus filius ejus (Grimoaldi) parvulus in loco ipsius cum predicto rege Dagoberto major-domus palatii effectus est. The anonymous continuator of Fredegarius in the year 714. chap. 104.

granted to the nobility. Hence the great offices were continued to be given for life, and this usage was every day more firmly established.

But I have some particular reflections to make here in respect to fiefs; and in the first place I do not question but most of them became hereditary from this time.

In the treaty of Andeli (a), Gontram and his nephew Childbert, engage to maintain the donations made to the vassals and churches by the kings his predecessors; and leave is given to the * wives, daughters, and widows of kings, to dispose by will and in perpetuity whatever they hold of the exchequer.

Marculfus wrote his formularies at the time (b) of the mayors. We find several † in which the kings made donations both to the person and to his heirs; and as the formularies are images of the common actions of life, they prove that part of the fiefs were become hereditary towards the end of the first race. They were far from having in those days the idea of an unalienable demesne; this is a modern thing, which they knew neither in theory nor practice.

In proof hereof we shall presently produce no less than positive facts; and if I can shew a time in which there were no longer any benefices for the army, nor any funds for its support, we must certainly conclude that the ancient benefices had been alienated. The time I mean is that of Charles Martel, who founded some new fiefs, which we should carefully distinguish from those of the earliest date.

When the kings began to make grants in perpetuity, either through the corruption which crept into the government, or by
reason

(a) Cited by Gregory of Tours, book ix. See also the edict of Clotharius II. in the year 615. art. 16.

* *Ut si quid de agris fiscalibus vel speciebus atque præsidio pro arbitrii sui voluntate facere, aut cuiquam conferre voluerint, fixa stabilitate perpetuo conservetur.*

(b) See the 24th and 34th of the first book.

† See the 14th formula of the first book, which is equally applicable to the fiscal estates given directly and in perpetuity, or given at first as a benefice, and afterwards in perpetuity: *Sicut ab illo aut a fisco nostro fuit possessa.* See also the 17th formula, *ibid.*

reason of the constitution itself, which continually obliged the kings to confer rewards; it was natural that they should begin with giving the perpetuity of the fiefs, rather than of the counties. For to deprive themselves of some acres of land was no great matter; but to renounce the right of disposing of the great offices, was divesting themselves of their very power.

CHAP. VIII.

In what manner the Allodial Estates were changed into Fiefs.

THE manner of changing an allodial estate into a fief, may be seen in a formulary of Marculfus (a). The owner of the land gave it to the king, who restored it to the donor by way of usufruct, or benefice, and then the latter [nominated his heirs to the king.

In order to find out the reasons which induced them thus to change the nature of the *allodia*, I must trace the source of the ancient prerogatives of our nobility, a nobility who for these eleven centuries have been covered with dust, sweat, and blood.

Those who were seized of fiefs enjoyed very great advantages. The composition for the injuries done them was greater than that of freemen. It appears by the formularies of Marculfus, that it was a privilege belonging to the king's vassal, that whoever killed him should pay a composition of six hundred sous. This privilege was established by the Salic law (b), and by that of the Ripuarians (c); and at the same time that these two laws ordained a composition of six hundred sous for the murder of the king's vassal, they gave but (d) two hundred for the murder of a person freeborn, if he was a Frank or Barbarian

(a) Book i. formulary 13.

(b) Tit. 44. See also titles 66. § 3. & 4. & tit. 74.

(c) Tit. 2.

(d) See also the law of the Ripuarians, tit. 7. and the Salic law tit. 44. art. 1. & 4.

Barian living under the Salic law ; and only a hundred for a Roman.

This was not the only privilege belonging to the king's vassals. When (a) a man was summoned in court, and did not make his appearance, nor obey the judges orders, he was appealed before the king ; and if he persisted in his contumacy, he was excluded from * the king's protection, and no one was allowed to entertain him, or even to give him a morsel of bread. Now if he was a person of an ordinary condition, his goods (b) were confiscated ; but if he was the king's vassal, they were not (c). The first by his contumacy was deemed sufficiently convicted of the crime, the second was not ; the former (d) for the smallest crimes was obliged to undergo the trial by boiling water, the latter (e) was condemned to this trial only in the case of murder ; in fine, the king's vassal (f) could not be compelled to swear in court against another vassal. These privileges augmented daily, and the capitulary of Carlomannus (g) does this honour to the king's vassals, that they shall not be obliged to swear in person, but only by the mouth of their own vassals. Besides, when a person who had these honours did not repair to the army, his punishment was to abstain from flesh meat and wine as long as he had been absent from the service ; but a freeman (h) who neglected to follow his count, paid a composition † of sixty sous, and was reduced to a state of servitude till he paid it.

It is very natural, therefore, to think that those Franks who were not the king's vassals, and much more the Romans, became fond of entering into the state of vassalage ; and that they might not be deprived of their demesnes, they devised the

VOL. II.

Z z .

usage

(a) Salic law tit. 59. & 76.

* Extra sermonem regis. Salic law, tit. 59. and 76.

(b) Ibid. tit. 59. § 1.

(c) Ibid. tit. 76. § 1.

(d) Ibid. tit. 56. & 59.

(e) Ibid. tit. 76. § 1.

(f) Ibid. tit. 76. § 2.

(g) Apud Vernis Palatium, in the year 883. art. 4. & 11.

(h) Capitulary of Charlemagne, in the year 812. art. 1. & 31.

† Heribannum.

usage of giving their *allodium* to the king, of receiving it from him afterwards as a fief, and of nominating him to their heirs. This usage was always continued, and took place especially during the disorders of the second race, when every body stood in need of a protector, and wanted to incorporate himself with the ¶ other lords, and to enter, as it were, into the feudal monarchy, because the political no longer existed.

This continued under the third race, as we find by several † charters; whether they gave their *allodium*, and resumed it by the same act; or whether it was declared an *allodium*, and afterwards acknowledged as a fief. These were called "fiefs of resumption."

This does not imply, that those who were seized of fiefs administered them like prudent fathers of families; for though the freemen grew desirous of being possessed of fiefs, yet they managed this sort of estates as usufructs are managed in our days. This is what induced Charlemagne, the most vigilant and attentive prince we ever had, to make a great many regulations (a) to hinder the fiefs from being degraded in favour of allodial estates. This proves only that in his time most benefices were still only for life, and consequently that they took more care of the *allodia* than of the benefices; but it is no argument that they did not chuse rather to be the king's bondmen than freemen. They might have reasons for disposing of a particular portion of a fief, but they were not willing to be stripped even of their dignity.

I

¶ Non infirmis reliquit hæredibus, says Lambert d'Ardres in Du Cange, on the word *Alodis*.

† See those quoted by Du Cange in the word *Alodis*, and those produced by Galland, in his treatise of allodial lands, page 14. and the following.

(a) Second capitulary of the year 802. art. 10. and the 7th capitulary of the year 803. art. 3. the 1st capitulary incerti anni, art. 49, the 5th capitulary of the year 806. art. 7. the capitulary of the year 779, art. 29. and the capitulary of Lewis the Pious, in the year 829. art. 1.

I know likewise that Charlemagne complains in a certain capitulary (b), that in some places there were people who gave away their fiefs in property, and redeemed them afterwards in property. But I do not say, that they were not fonder of the property than of the usufruct; I mean only, that when they could convert an allodium into a fief, which was to descend to their heirs, as is the case of the formulary above mentioned, they had very great advantages in doing it.

CHAP. IX.

How the Church-lands were converted into Fiefs.

THE use of the fiscal lands should have been only to serve as donations by which the kings were to encourage the Franks to undertake new expeditions, and by which, on the other hand, these fiscal lands were increased. This, as I have already observed, was the spirit of the nation; but these donations took another turn. There is still extant (c) a speech of Chilperic, grandson of Clovis, in which he complains that almost all these lands had been already given away to the church. "Our exchequer, says he, is impoverished, and our riches are transferred to the clergy *; none reign now but bishops, who live in grandeur, while our grandeur is over."

This was the reason that the mayors, who durst not attack the lords, stripped the churches; and one of the † motives alledged by Pepin for entering Neustria, was his having been in-

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vited

(b) The 5th of the year 806, art. 8.

(c) In Gregory of Tours, book vi. chap. 46.

* This is what induced him to annul the testaments made in favour of the clergy, and even the donations of his father; Gontram re-established them, and made them even new donations. Gregory of Tours, book 7. chap. 7.

† See the annals of Metz, year 687. Excitor imprimis querelis sacerdotum & servorum Dei, qui me sæpius adierunt, ut pro sublati injuste patrimonii, &c.

vited thither by the clergy, to put a stop to the encroachments of the kings, that is of the mayors, who stripped the church of all her possessions.

The mayors of Austrasia, that is, the family of the Pepins, had behaved towards the clergy with more moderation than those of Neustria and Burgundy. This is evident by our chronicles (b), in which we see the monks eternally admiring the devotion and liberality of the Pepins. They themselves had been possessed of the first places in the church. One crow does not pull out the eyes of another, as (c) Chilperic said to the bishops.

Pepin subdued Neustria and Burgundy; but as his pretence for destroying the mayors and kings was the oppression of the clergy, he could not strip them without contradicting his own title, and shewing that he made a jest of the nation. However, the conquest of two great kingdoms, and the destruction of the opposite party, afforded him sufficient means of satisfying his generals.

Pepin made himself master of the monarchy, by protecting the clergy; his son Charles Martel could not maintain his power, but by oppressing them. This prince finding that part of the regal and fiscal lands had been given, either for life or in perpetuity, to the nobility, and that the clergy, by receiving both from rich and poor, had acquired a great part even of the allodial estates, he stripped the church; and as the fiefs of the first division were no longer in being, he formed a second division*. He took for himself and for his officers the church-lands, and the churches themselves; and put a stop to an evil which differed in this respect from ordinary evils, that by being extreme, it was so much the more easy to cure.

CHAP.

(b) See the annals of Metz.

(c) In Gregory of Tours.

* *Karlus plurima juri ecclesiastico detrahens prædia fisco sociavit, ac deinde militibus distribuit. Ex Chronico Centulensi, lib. 2.*

CHAP. X.

Riches of the Clergy.

SO great were the donations made to the clergy, that under the three races of our princes they must have possessed several times all the lands of the kingdom. But if our kings, the nobility, and the people, found the way of giving them all their estates, they found also the method of getting them back again. The spirit of religion founded a great number of churches under the first race; but the military spirit was the cause of their being given away afterwards to the soldiery, who divided them amongst their children. What a number of lands must have then been taken from the clergy's mensalia! The kings of the second race opened their hands, and made new donations to them; but the Normans, who came afterwards, plundered and ravished all before them, persecuting especially the priests and monks, and continually searching out for abbeys and other religious foundations. In this situation, what a loss must the clergy have sustained! There were hardly ecclesiastics left to demand the estates of which they had been deprived. There remained therefore, for the religious piety of the third race, foundations enough to make, and lands to bestow. The opinions which were broached and spread in those days, would have deprived the laity of all their estates, if they had been but honest enough. But, if the clergy were full of ambition, the laity were not without their's; if they gave their estates upon their death-bed to the church, their successors wanted to resume them. We meet with nothing but continual quarrels between the lords and the bishops, the gentlemen and the abbots; and the clergy must have been very hard set, since they were obliged to put themselves under the protection of certain lords, who defended them for a moment, and afterwards oppressed them.

But now a better administration, which had been established under the third race, gave the clergy leave to augment their possessions;

possessions; when the Calvinists sallied forth, and coined money of all the gold and silver they found in the churches. How could the clergy be sure of their estates, when they were not even sure of their persons? They were treating of controversial subjects, while their archives were burning. What did it avail them to demand again of a ruined nobility what these were no longer possessed of, or what they had mortgaged a thousand ways? The clergy have constantly acquired, constantly refunded, and yet are still acquiring.

CHAP. XI.

State of Europe at the time of Charles Martel.

CHARLES MARTEL, who undertook to strip the clergy, found himself in a most happy situation. He was both feared and loved by the soldiery, whose interest he promoted, having the pretence of his wars against the Saracens. He was hated indeed by the clergy, but (a) he had no need of them. The pope, to whom he was necessary, stretched out his arms to him. Every one knows the famous embassy * he received from Gregory III. These two powers were strictly united, because they could not do one without the other; the pope stood in need of the Franks to support him against the Lombards and the Greeks; the Franks had occasion for the pope, to serve for a barrier against the Greeks, and to embarrass the Lombards. It was impossible therefore for the enterprise of Charles Martel to miscarry.

St Eucherius, bishop of Orleans, had a vision which frightened all the princes of that time. I must produce to this purpose
the

(a) See the annals of Metz.

* Epistolam quoque, decreto Romanorum principum, sibi predictus præsul Gregorius miserat, quod sese populus Romanus relicta imperatoris dominatione, ad suam defensionem & invictam clementiam convertere voluisset. Annals of Metz, year 741. Eo pacto patrato, ut a partibus imperatoris recederet. Fredegarius.

the letter (a) written by the bishops assembled at Rheims to Lewis king of Germany, who had invaded the territories of Charles the Bald ; because it will shew us the state of things in those times, and the disposition of people's minds. They say (b), " That St Eucherius having been snatched up into heaven, " he saw Charles Martel tormented in the bottom of hell by " order of the saints, who are to assist with Jesus Christ at the " last judgment ; that he had been condemned to this punish- " ment before his time, for having stript the churches of their " possessions, and thereby rendered himself guilty of the sins " of all those who had endowed them ; that king Pepin had " held a council upon this occasion ; that he had ordered all " the church-lands he could recover to be restored to the church ; " that as he could get back only a part of them, because of his " dispute with Vairfre duke of Aquitaine, he issued out letters " called *precaria* * in favour of the churches for the remainder, " and made a law that the laity should pay a tenth part of the " church-lands they possessed, and twelve deniers for each house ; " that Charlemagne did not give the church-lands away ; on the " contrary, that he made a capitulary, by which he engaged both " for himself and for his successors never to give them away ; " that all they say is committed to writing, and that a great " many of them heard the whole related by Lewis the Pious, " the father of those two kings."

King Pepin's regulation, mentioned by the bishops, was made in the council held at Leptines (c). The church found this advantage in it, that such as had received those lands held them

no

(a) Anno 858, apud Carisiacum : Baluzius's edition, tom. 1. page 101.

(b) Ibid. art. 7. page 109.

* *Precaria*, quod *precibus* utendum conceditur, says Cujas in his notes upon the first book of fiefs. I find in a diploma of king Pepin, dated the third year of his reign, that this prince was not the first who established these *precaria* ; he cites one made by the mayor Ebroin, and continued after his time. See the diploma of this king, in the fifth tom. of the historians of France by the Benedictines, art. 6.

(c) In the year 743. See the 5th book of the capitularies, art. 3. Baluzius's edition, page 825.

no longer but in a precarious manner, and moreover that she received the tithe or tenth part and twelve deniers for every house that had belonged to her. But this was only a palliative, which did not remove the disorder.

This even met with opposition, and Pepin was obliged to make another capitulary (b), in which he enjoins those who held any of those benefices to pay this tithe and duty, and even to keep up the houses belonging to the bishopric or monastery, under the penalty of forfeiting those possessions. Charlemagne * renewed the regulations of Pepin.

That part of the same letter which says, that Charlemagne promised both for himself and for his successors, never to divide again the church-lands among the soldiery, is agreeable to the capitulary of this prince, given at Aix-la-Chapelle, in the year 803, with a view of removing the apprehensions of the clergy upon this subject. But the donations already made were still † continued. The bishops very justly add, that Lewis the Pious followed the example of Charlemagne, and did not give away the church-lands to the soldiery.

And yet the old abuses were carried to such a pitch, that the laity under the children (a) of Lewis the Pious, introduced priests into their churches, or drove them away, without the consent of the bishops. The churches (b) were divided among the next heirs, and when they were held in an indecent manner, the bishops (c) had no other remedy left than to remove the relics.

By

(b) That of Metz in the year 756. art. 4.

* See his capitulary in the year 803. given at Worms, Baluzius's edition, page 411. where he regulates the precarious contract; and that of Franckfort, in the year 794. page 267. art. 24. in relation to the repairing of the houses; and that of the year 800, page 330.

† As appears by the preceding note, and by the capitulary of Pepin king of Italy, where it says, that the king would give the monasteries in fief to those who would vow fealty for fiefs: it is added to the law of the Lombards, book iii. tit. 1. §. 3. to the Salic laws, collection of Pepin's laws in Echard, pag. 195. tit. 26. art. 4.

(a) See the constitution of Lotharius I. in the law of the Lombards, book iii. law 1. §. 43.

(b) Ibid. §. 44.

(c) Ibid.

By the capitulary (d) of Compeigne, it is enacted that the king's commissary shall have a right to visit every monastery, together with the bishop, by the consent * and in presence of the person who holds it; and this general rule shews that the abuse was general.

Not that there were laws wanting for the restitution of the church-lands. The pope having reproached the bishops for their neglect in regard to the re-establishment of the monasteries, they wrote to Charles the Bald (e) that they were not affected with this reproach, because they were not culpable; and they reminded him of what had been promised, resolved and decreed in so many national assemblies. In fact, they quoted nine.

Still they went on disputing; till the Normans came and made them all agree.

CHAP. XII.

Establishment of the Tithes.

THE regulations made under king Pepin had given the church rather hopes of relief, than effectively relieved her; and as Charles Martel found all the landed estates in the hands of the clergy, Charlemagne found all the church-lands in the hands of the soldiery. The latter could not be forced to restore what had been given them; and the circumstances of that time rendered the thing still more impracticable than it was of its own nature. On the other hand, christianity ought not to perish for want of ministers †, churches, and instructions.

VOL. II.

3 A

This

(d) Given the 28th year of the reign of Charles the Bald, in the year 868. Baluzius's edition, page 203.

(e) *Confilium apud Bonoilum*, the 16th year of Charles the Bald, in the year 856. Baluzius's edition, page 78.

* *Cum consilio & consensu ipsius qui locum retinet.*

† In the civil wars which broke out at the time of Charles Martel, the lands belonging to the church of Rheims were given away to laymen; the clergy were left to shift as well as they could, says the life of S. Remigius, Surius, tom. 1. page 279.

This was the reason of Charlemagne's establishing (a) the tithes, a new kind of property, which had this advantage in favour of the clergy, that as they were given particularly to the church, it was easier in process of time to know when they were usurped.

Some have attempted to make this establishment of an earlier date; but the authorities they produce seem rather, I think, to prove the contrary. The constitution of Clotharius † says only that they shall not raise certain ‡ tithes on church lands: so far then was the church from exacting tithes at that time, that its whole pretension was to be exempted from paying them. The second council (b) of Macon, which was held in 585, and ordains the payment of tithes, says indeed that they were paid in ancient times; but it says also that the custom of paying them was then abolished.

No one questions but the clergy opened the bible before Charlemagne's time, and preached the gifts and offerings of the Leviticus. But I say, that before that prince's reign, though the tithes might have been preached up, yet they were never established.

I took notice that the regulations made under king Pepin had subjected those who were seized of church-lands in fief to the payment of tithes, and to repairing of the churches. It was a great point to oblige by a law, whose justice could not be disputed, the principal men of the nation to set the example.

Charlemagne

(a) Law of the Lombards, book 3. tit. 3. §. 1. and 2.

(b) Canone 5. ex tomo 1. conciliorum antiquorum Galliae, opera Jacobi Sirmundi.

† It is that on which I have descanted in the 4th chapter of this book, and is to be found in Baluzius's edition of the capitularies, tom. i. art. 11, page 9.

‡ *Agraria & pascuaria vel decimas porcorum ecclesiae concedimus, ita ut actor aut decimator in rebus ecclesiae nullus accedat.* The capitulary of Charlemagne in the year 807. Baluzius's edition, page 336. explains extremely well what is meant by that sort of tithe from which the church is exempted by Clotharius; it was the tithe of the hogs which were put into the kings forests to fatten; and Charlemagne enjoins his judges to pay it, as well as other people, in order to set an example: it is plain, that this was a right of feigniory or œconomy,

Charlemagne did more; and we find by the capitulary (a) *de Villis*, that he obliged his own demefnes to the payment of the tithes: this was still a greater example.

But the common people are hardly capable of being induced by examples to give up their own interests. The fynod of (b) Francfort furnished them with a more cogent motive to pay the tithes. A capitulary was made in that fynod, wherein it is faid, that in the laſt * famine the ears of corn were found empty, having been devoured by devils, and that the voices of thoſe infernal ſpirits had been heard, reproaching them with not having paid the tithes; in conſequence of which it was ordained that all thoſe who were ſeized of church-lands ſhould pay the tithes; and the next conſequence was, that the obligation was extended to all.

Charlemagne's project did not ſucceed at firſt; for it ſeemed too heavy a burden †. The payment of the tithes among the Jews was connected with the plan of the foundation of their republic; but here the payment of tithes was a burden quite independent of the other charges of the eſtabliſhment of the monarchy. We find by the regulations (c), added to the law of the Lombards, the difficulty there was in cauſing the tithes to be accepted by the civil laws; and how difficult it was to get them admitted by the eccleſiaſtic laws, we may eaſily judge from the different canons of the councils.

The people conſented at length to pay the tithes, upon condition that they might have a power of redeeming them. This

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the

(a) Art. 6. Baluzius's edition, page 332, it was given in the year 800.

(b) Held under Charlemagne, in the year 794.

(c) Among others, that of Lotharius, book 3. tit. 5. chap. 6.

* Experimento enim didicimus, in anno quo illa valida fames irrepsit, ebullire vacuas annonas a dæmonibus devoratas, & voces exprobrationis auditas, &c. Baluzius's edition, page 267. art. 23.

† See amongſt the reſt the capitulary of Lewis the Pious, in the year 829. Baluzius's edition, page 663. againſt thoſe who to avoid paying tithes neglected to cultivate the lands, &c. art. 5. Nonis quidem & decimis, unde & genitor noſter et nos frequenter in diverſis placitis admonitionem fecimus.

the constitution of Lewis the Pious (a), and that of the emperor Lotharius (b) his son, would not allow.

The laws of Charlemagne, in regard to the establishment of tithes, were a work of necessity; a work in which religion only, and no superstition, was concerned.

His famous division of the tithies into four parts, for the repairing of the churches, for the poor, for the bishop, and the clergy, manifestly proves that he wanted to restore the church to that fixt and permanent state which she had lost.

His will * shews that he was desirous of repairing the mischief done by his grandfather Charles Martel. He made three equal shares of his moveable goods; two of these he divided each into one-and-twenty parts, for the one-and-twenty metropolitan churches of his empire; each part was to be subdivided between the metropolitan and the suffragan bishops. The remaining third he divided into four parts; one he gave to his children and grandchildren; another was added to the two thirds already given; and the other two were bequeathed to charitable uses. It seems as if he looked upon the immense donation he was making to the church less as a religious act, than as a political distribution.

CHAP. XIII.

Of the Elections of Bishops and Abbots.

AS the churches were become poor, the kings resigned the right of (c) nominating to bishopricks and other ecclesiastic benefices. The princes gave themselves less trouble about the ministers

(a) In the year 829, art. 7. in Baluzius, tom. i. pag. 663.

(b) In the law of the Lombards, book 3. tit. 3. §. 8.

(c) See the capitulary of Charlemagne in the year 803. art. 2. Baluzius's edition, page 379. and the edict of Lewis the Pious, in the year 834. in Goldast. *Constit. Imperial*, tom. i.

* It is a kind of codicil produced by Eginhard, and different from the will itself, which we find in Goldastus and Baluzius.

ministers of the church; and the candidates were less solicitous in applying to their authority. Thus the church received a kind of compensation for the possessions she had lost.

Hence if Lewis the Pious * left the people of Rome in possession of the right of chusing their popes, it was owing to the general spirit that prevailed in his time: he behaved in respect to the see of Rome the same as to other bishoprics.

CHAP. XIV.

Of the Fiefs of Charles Martel.

I SHALL not pretend to determine whether Charles Martel, in giving the church-lands in fief, made a grant of them for life or in perpetuity. All I know is, that under Charlemagne †, and Lotharius I. ‡ there were possessions of this kind which descended to the next heirs, and were divided amongst them.

I find moreover that one part of them || was given us allodia, and the other as fiefs.

I took notice that the proprietors of the allodia were subject to the service all the same as the possessors of the fiefs. This, without doubt, was partly the reason that Charles Martel made grants of allodial lands, as well as of fiefs.

We must observe, that the fiefs having been changed into church-lands, and these again into fiefs, they both borrowed something of one another's nature. Thus the church-lands had the privileges of fiefs, and these had the privileges of church-lands;

* This is mentioned in the famous canon, Ego Ludovicus, which is visibly supposititious; it is in Baluzius's edition, page 591. in the year 817.

† As appears by his capitulary, in the year 801. art. 17. in Baluzius, tom. 1. page 360.

‡ See his constitution inserted in the code of the Lombards, book 3. tit. 1. § 44.

|| See the above constitution, and the capitulary of Charles the Bald, in the year 846. chap. 20. in Villa Sparnaco, Baluzius's edition, tom. 2. page 31. and that of the year 853. chap. 3. and 5. in the synod of Soissons, Baluzius's edition tom. 2. page 54. and that of the year 854. apud Atiniacum, chap. 10. Baluzius's edition, tom. 2. page 70. See also the first capitulary of Charlemagne, incerti anni, art. 49. and 56. Baluzius's edition, tom. 1. page 519.

lands: Such were the * honourable rights of the churches, established in those days.

CHAP. XV.

Confusion of the Royalty and Mayoralty. The second race.

THE order of my subjects has made me break through the order of time, so as to speak of Charlemagne before I had made mention of the famous epocha of the translation of the crown to the Carlovingsians under king Pepin; a revolution, which, contrary to the nature of common events, is more remarkable perhaps in our days than when it happened.

The kings had no authority; they had only an empty name. The title of king was hereditary, and that of mayor elective. Though the mayors in the latter times set whom they pleased of the Merovingians on the throne, they had not yet taken a king of another race; and the ancient law, which fixed the crown in a particular family, was not yet effaced out of the hearts of the Franks. The king's person was almost unknown in the monarchy; but the royalty was well known. Pepin, son of Charles Martel, thought it would be proper to confound those two titles, a confusion which would leave it uncertain whether the new royalty was hereditary or not; and this was sufficient for him, who to the regal dignity had joined a great power. The mayor's authority was then blended with that of the king. In the mixture of these two authorities a kind of reconciliation was made; the mayor had been elective, and the king hereditary; the crown at the beginning of the second race was elective, because the people chose; it was hereditary, because they always chose in the same family †.

Father.

* See the capitularies book 5. art. 44. and the edict of Pistes in the year 869. art. 8. and 9. where we find the honourable rights of the lords established, in the same manner as they are at this very day.

† See the will of Charlemagne, and the division which Lewis the Pious made to his children in the assembly of the states held at Quierzy, produced by Goldast. quem populus eligere voluit, ut patri suo succedat in regni hereditate.

Father le Cointe, in opposition to the authority of all ancient records (a), denies † that the pope authorised this great change; and one of his reasons is, that he would have committed an injustice. A fine thing to see an historian judge of what men have done, by what they ought to have done! at this rate we should have no history at all.

Be that as it may, it is very certain that immediately after duke Pepin's victory, the Merovingians ceased to be the reigning family. When his grandson Pepin was crowned king, it was only a ceremony the more, and a phantom the less; he acquired nothing thereby but the royal ornaments; there was no change made in the nation.

This I have said, in order to fix the moment of the revolution, to the end that we may not be mistaken in looking upon that as a revolution which was only a consequence of it.

When Hugh Capet was crowned king at the beginning of the third race, there was a much greater change, because the kingdom passed from a state of anarchy to some kind of a government; but when Pepin ascended the throne, there was only a transition from one government to another of the same nature.

When Pepin was crowned king, there was only a change of name; but when Hugh Capet was crowned, there was a change in the nature of the thing, because by uniting a great fief to the crown the anarchy ceased.

When Pepin was crowned, the title of king was united to the highest office; when Hugh Capet was crowned, it was united to the greatest fief.

CHAP.

(a) The anonymous Chronicle in the year 752, and Chronic. Centul. in the year 754.

† Fabella quæ post Pippini mortem excogitata est, æquitati ac sanctitati Zachariæ papæ plurimum adversatur—Ecclesiastic annals of the French, tom. 2. page 319.

CHAP. XVI.

A particular thing in the Election of the Kings of the Second Race.

WE find by the formulary (a) of Pepin's consecration, that Charles and Carloman were also anointed and blessed; and that the French nobility bound themselves, on pain of interdiction and excommunication, never to chuse a prince * of another family.

It appears by the wills of Charlemagne and Lewis the Pious, that the Franks made a choice among the king's children; which agrees with the above-mentioned clause. And when the empire was transferred from Charlemagne's family, the election, which before had been conditional, became simple and absolute; so that the ancient constitution was altered.

Pepin perceiving himself near his end, assembled (b) the lords both temporal and spiritual at St Denis, and divided his kingdom between his two sons Charles and Carloman. We have not the acts of this assembly; but we find what was there transacted, in the author of the ancient historical collection, published by Canisius, and in (c) the writer of the annals of Metz, according to (d) the observation of Baluzius. Here I meet with two things in some measure contradictory; that he made this division with the consent of the nobility, and afterwards that he made it by his paternal authority. This proves what I said, that the people's right in the second race was to chuse in the same family; it was, properly speaking, rather a right of exclusion, than that of election.

This

(a) Vol. 5th of the historians of France, by the Benedictines, page 9.

* Ut nunquam de alterius lumbis regem in ævo præsumant eligere sed ex ipsorum. Vol. 5th of the historians of France, page 10.

(b) In the year 768.

(c) Tom. 2. lectionis antiquæ.

(d) Edition of the capitularies, tom. 1. page 188.

This kind of elective right is confirmed by the records of the second race. Such is this capitulary of the division of the empire made by Charlemagne among his three children, in which, after settling their division, he says, (a) "That if one of the three brothers happens to have a son, such as the people shall be willing to chuse as a fit person to succeed to his father's kingdom, his uncles shall consent to it."

This same regulation is to be met with in the division (b), which Lewis the Pious made among his three children, Pepin, Lewis, and Charles, in the year 837, at the assembly of Aix-la-Chapelle; and likewise in another * division, made twenty years before, by the same emperor, between Lotharius, Pepin, and Lewis. We may likewise see the oath which Lewis the Stammerer took at Compeigne, at his coronation. "I Lewis, by the divine mercy, and the people's election (c) appointed king, do promise * * * ." What I say is confirmed by the acts of the council of Valence (d) held in the year 890, for the election of Lewis son of Boson to the kingdom of Arles. Lewis was there elected, and the principal reason they give for chusing him is, that he was of the imperial family †, that Charles the Fat had conferred upon him the dignity of king, and that the emperor Arnold had invested him by the sceptre, and by the ministry of his ambassadors. The kingdom of Arles, like the other dismembered or dependent kingdoms of Charlemagne, was elective and hereditary.

(a) In the 1st capitulary of the year 806. Baluzius's edition, page 439, art. 5.

(b) In Goldast. Imperial Constitut. tom. 2. page 19.

* Baluzius's edition, page 574. art. 14. Si vero aliquis illorum decedens legitimos filios reliquerit, non inter eos potestas ipsa dividatur, sed potius populus pariter conveniens, unum ex eis quem dominus voluerit, eligat, & hunc senior frater in loco fratris et filii suscipiat.

(c) Capitulary of the year 876. Baluzius's edition, page 272.

(d) In father Labbe's councils, tom. 9. col. 424. and in Dumont's Corp. Diplom. tom. 13. art. 36.

† By the mother's side.

CHAP. XVII.

CHARLEMAGNE.

CHARLEMAGNE's intention was to restrain the power of the nobility within proper bounds, and to hinder them from oppressing the freemen and the clergy. He balanced the several orders of the state, and remained perfect master of them all. The whole was united by the strength of his genius. He led the nobility continually from one expedition to another; giving them no time to form designs of their own, but employing them intirely in following his. The empire was supported by the greatness of its chief; the prince was great, but the man was greater. The kings his children were his first subjects, the instruments of his power, and patterns of obedience. He made admirable regulations; and what was still more admirable, he took care to see them executed. His genius diffused itself through every part of the empire. We find in this prince's laws a spirit of forecast and sagacity that comprehizes every thing, and a certain force that makes every thing give way. All prettexts (a) for evading the performance of duties are removed, neglects are corrected, abuses reformed or prevented. He knew how to punish, but he understood much better how to pardon. He was great in his designs, and simple in the execution of them. No prince was ever possessed in a higher degree of the art of performing the greatest things with ease, and the most difficult with expedition. He was continually traversing the several parts of his vast empire, and made them feel the weight of his hand wherever he fell. New difficulties sprung up on every side, and on every side he removed them. Never prince had more resolution in facing dangers; never

(a) See his 3d capitulary of the year 811, p. 486. art. 1, 2, 3, 4, 5, 6, 7, & 8 and the 1st capitulary of the year 812, p. 490. art. 1. Ibid. page 494. art. 9. and 11. and others.

never prince knew better how to shun them. He mocked all manner of perils, and particularly those to which great conquerors are generally subject, namely conspiracies. This surprising prince was extremely moderate, of a very mild character, and of a plain simple behaviour. He loved to converse freely with the lords of his court. He gave way perhaps too much to his passion for the fair sex; a failing, however, which in a prince who always governed by himself, and who spent his life in a continual succession of toils, may merit some indulgence. He was wonderfully exact in his expences; administering his demesnes with prudence, attention, and œconomy. A father (a) might learn from his laws how to govern his family; and we find in his capitularies the pure and sacred source from whence he derived his riches. I shall add only one word more; he gave orders that the * eggs of the barons of his demesnes and the superfluous herbs of his gardens should be sold; a most wonderful œconomy in a prince who had distributed among his people all the riches of the Lombards, and the immense treasures of those Huns who had plundered the universe.

This great prince was afraid lest those whom he intrusted in distant parts with the command, should be inclined to revolt; and thought he should find more docility among the clergy. For this reason he erected a great number of bishoprics in Germany (b), and endowed them with very large fiefs. It appears by some charters that the clauses containing the prerogatives of those fiefs, were not different from those which were commonly inserted in those grants †; though at present

3 B 2

we

(a) See the capitulary de Villis in the year 800. his 2d capitulary of the year 813. art. 6. & 19. and the 5th book of the capitularies, art. 303.

* Capitul. de Villis, art. 39. See this whole capitulary, which is a master-piece of prudence, good administration, and œconomy.

(b) See among others the foundation of the archbishopric of Bremen in the capitulary of the year 789. Baluzius's edition, page 245.

† For instance the prohibition to the king's judges against entering upon the territory to demand the freda, and other duties. I have said a great deal concerning this in the preceding book.

we find the principal ecclesiastics of Germany invested with a sovereign power. Be that as it may, these were some of the contrivances he used against the Saxons. That which he could not expect from the indolence and supineness of a vassal, he thought he might promise himself from the sedulous attention of a bishop. Besides, a vassal of that kind, far from making use of the conquered people against him, would rather stand in need of his assistance to support himself against his people.

CHAP. XVIII.

The Successors of CHARLEMAGNE.

WHEN Augustus Cæsar was in Egypt, he ordered Alexander's tomb to be opened; and upon their asking him whether he was willing they should open the tombs of the Ptolomeys, he answered that he wanted to see the king, and not the dead. Thus in the history of the second race, we are continually looking for Pepin and Charlemagne; we want to see the kings, and not the dead.

A prince who was the sport of his passions, and a dupe even to his virtues; a prince who never understood rightly either his own strength or weakness; a prince who was incapable of making himself either feared or beloved; a prince in fine, who with few vices in his heart had all manner of defects in his understanding, took the reins of the empire into his hands which had been held by Charlemagne.

Lewis the Pious, mixing all the indulgence of an old husband with all the weakness of an old king, flung his family into disorder, which was followed by the downfall of the monarchy. He was continually altering the divisions he had made among his children. And yet these divisions had been confirmed each in their turn by his own oath, and by those of his children and the nobility. This was as if he wanted to try the fidelity of his subjects; it was endeavouring by confusion, scruples, and equivocation to puzzle their obedience; it

was

was confounding the different rights of those princes, and rendering their titles dubious, especially at a time when there were but few strong-holds, and when the principal bulwark of authority was the fealty sworn and accepted.

The emperor's children, in order to preserve their divisions, courted the clergy, and granted them privileges till then unheard. These privileges were specious; the clergy were induced to warrant a thing which those princes would have been glad they had authorised. Agobard (a) represents to Lewis the Pious, his having sent Lotharius to Rome, in order to have him declared emperor; and that he had made a division of his dominions among his children, after having consulted heaven by three days fasting and praying. What defence could a superstitious prince make against the attack of superstition! It is easy to perceive what a shock the supreme authority must have twice received from the imprisonment of this prince, and from his public penance; they wanted to degrade the king, and they degraded the regal dignity.

The strength which the nation had derived from Charlemagne, lasted well enough under Lewis the Pious to enable the state to support its grandeur, and to command respect from strangers. The prince's understanding was weak, but the nation was warlike. The royal authority declined at home, though there seemed to be no diminution of power abroad.

Charlemagne, his father, and his grandfather, were successive rulers of the monarchy. The first flattered the avarice of the soldiers; the other two that of the clergy; and the children of Lewis the Pious excited the ambition of both.

In the French constitution, the whole power of the state was lodged in the hands of the king, the nobility and clergy. Charles Martel, Pepin, and Charlemagne, joined sometimes their interest with one of those parties to check the other, and generally

(a) See his letters.

generally with both : but the children of Lewis the Pious disjoined both those bodies from the king, by which means the royal authority was too greatly debilitated.

The clergy had reason to repent the protection they had granted to Lewis the Pious's children. This prince, as I have already observed, had never given (a) any of the church-lands by *precepts* to the laity ; but it was not long before Lotharius in Italy, and Pepin in Aquitaine, quitted Charlemagne's plan, and resumed that of Charles Martel. The clergy had recourse to the Emperor against his children, but they themselves had weakened the authority they sued. In Aquitaine some condescension was shewn, but none in Italy.

The civil wars with which the life of Lewis the Pious had been embroiled, were the seed of those which followed his death. The three brothers, Lotharius, Lewis, and Charles, endeavoured each to bring over the nobility to their party. To those therefore who were willing to follow them they granted the church-lands by *precepts* ; so that to gain the nobility, they sacrificed the clergy.

We find in the capitularies *, that those princes were obliged to yield to the importunity of so many demands, and that what they would not often have freely granted was extorted from them : we see that the clergy thought themselves more oppressed by the nobility than by the kings. It appears also, that Charles the Bald † became the greatest enemy of the patrimony of the clergy, whether he was most incensed against them for having degraded his father on their account, or whether he
was

(a) See what the bishops say in the synod of the year 845, apud Teudonis villam, art. 4.

* See the synod in the year 845, apud Teudonis villam, art. 3. and 4. which gives a very exact description of things ; as also, that of the same year, held at the palace of Vernes, art. 12. and the synod of Beauvais also in the same year, art. 3. 4. and 6. and the capitulary in Villa Sparnaco, in the year 846. art. 25. and the letter which the bishops assembled at Rheims wrote in 858, to Lewis King of Germany, art. 8.

† See the capitulary in Villa Sparnaco, in the year 846. The nobility had set the king against the bishops, inasmuch that he expelled them from the assembly ; some canons of the synods were picked out, and they were told that these were the only ones which should be observed : nothing was granted them but what was impossible to be refused. See art. 20, 21, and 22. See also the letter which the bishops assembled at Rheims wrote in the year 858 to Lewis King of Germany, and the edict of Pîtres in the year 864. art. 5.

was the most timorous. Be this as it may, we meet with † continual quarrels in the capitularies between the clergy who demanded their lands, and the nobility who refused, evaded, or deferred to restore them; and the kings* between both.

The situation of things at that time is a spectacle really deserving of pity. While Lewis the Pious made immense donations out of his demesnes to the church, his children distributed the possessions of the clergy among the laity. The same hand which founded new abbies, often pulled down the old ones. The clergy had no fixed state; one moment they were stripped, another they received satisfaction; but the crown was continually losing.

Towards the close of the reign of Charles the Bald, and from that time forward, there was an end of the disputes of the clergy and laity, concerning the restitution of lands. The bishops indeed breathed out still a few sighs in their remonstrances to Charles the Bald, which we find in the capitulary of the year 856, and in the letter (a) they wrote to Lewis King of Germany, in the year 858: but they often proposed things and challenged promises so often eluded, that we plainly see they had no longer any hopes of obtaining their desire.

All that could be expected then, was (b) to repair in general the injuries done to church and state. The kings engaged not to deprive their vassals of their freemen, and not to give away the church-lands any more by *precepts**; so that the interests of the clergy and nobility seemed then to be united.

The

† See this very capitulary in the year 846, in Villa Sparnaco. See also the capitulary of the assembly held at Marfnam, in the year 847. art. 4. wherein the clergy reduced themselves to demand only the restitution of what they had been possessed of under Lewis the Pious. See also the capitulary of the year 851, at Marfnam, art. 6. and 7. which confirms the nobility and clergy in their several possessions, and that at Bonoilum, in the year 856, which is a remonstrance of the bishops to the king, because the evils, after so many laws, had not been remedied; and, in fine, the letter which the bishops assembled at Rheims wrote in the year 858, to Lewis King of Germany, art. 8.

(a) Art. 8.

(b) See the capitulary of the year 853, art. 6. and 7.

* Charles the Bald, in the synod of Soissons, says that he had promised the bishops not to issue out any more precepts relating to church-lands. Capitularies of the year 853, art. 11. Baluzius's edition, tom. ii. page 56.

The dreadful depredations of the Normans, as I have already observed, contributed greatly to put an end to those quarrels.

The authority of our kings diminishing every day, both for the reasons already given, and those which I shall give hereafter, they thought they had no better resource left, than to put themselves in the hands of the clergy. But the clergy had weakened the power of the kings, and the kings had weakened the influence of the clergy.

In vain did Charles the Bald and his successors call in the church to support the state, and to prevent its fall; in vain did they avail themselves of the † respect the people had for that body; to maintain that which they should have also for their prince; in vain did they endeavour (a) to give an authority to their laws by that of the canons; in vain did they join the ecclesiastic (b) with the civil punishments; in vain to counterbalance the authority of the count (c) did they give to each bishop the title of their commissary in the several provinces; it was impossible for the clergy to repair the mischief they had done; and a terrible misfortune, of which I shall speak anon, tumbled the crown to the ground.

CHAP. XIX.

That the Freemen were rendered capable of holding Fiefs.

I SAID that the freemen were led against the enemy by their count, and the vassals by their lord. This was the reason that

† See the capitulary of Charles the Bald, at Saponarias, in the year 859, art. 3. "Veni-
lon, whom I made archbishop of Sens, has consecrated me; and I ought not to be expelled
the kingdom by any body," *saltem sine audientia et iudicio episcoporum, quorum ministe-
rio in regem sum consecratus, et qui throni Dei sunt dicti, in quibus Deus sedet, et per
quos sua decernit iudicia, quorum paternis correctionibus et castigatoriis iudiciis me subdere
fui paratus, et in presenti sum subditus.*

(a) See the capitulary of Charles the Bald, de Carisiaco, in the year 857. Baluzius's edi-
tion, tom. ii. page 88, art. 1, 2, 3, 4, and 7.

(b) See the synod of Pistes in the year 862. art. 4. and the capitulary of Carloman and of
Lewis II. apud Vernis palatium, in the year 883. art. 4. and 5.

(c) Capitulary of the year 876. under Charles the Bald, in Synodo Pontigonensi, Balu-
zius's edition, art. 12.

that the several orders of the state balanced each other; and though the king's vassals had other vassals under them, yet they might be over-awed by the count, who was at the head of all the freemen of the monarchy.

The freemen (a) were not allowed at first to vow fealty for a fief; but in process of time this was permitted: and I find that this change was made during the time that elapsed from the reign of Gontram to that of Charlemagne. This I prove by the comparison that may be drawn between the treaty of Andely (b), signed by Gontram, Childebert, and Queen Brunchild, and the division* made by Charlemagne amongst his children, as well as a like division made by Lewis the Pious. These three acts contain pretty near the same regulations, with regard to the vassals: and as they regulate the very same points, under almost the same circumstances, the spirit as well as the letter of those three treaties are very near the same in this respect.

But as to what concerns the freemen, there is a capital difference. The treaty of Andely does not say that they might vow fealty for a fief; whereas we find in the divisions of Charlemagne and Lewis the Pious express clauses to empower them to vow fealty. This shews that a new usage had been introduced after the treaty of Andely, whereby the freemen were become capable of this great privilege.

This must have happened when Charles Martel, after distributing the church lands to his soldiers, partly in fief, and partly as allodia, made a kind of revolution in the feudal laws. It is very probable that the nobility, who were seized already of fiefs, found a greater advantage in receiving the new grants as allodia; and that the freemen thought themselves happy in accepting them as fiefs.

VOL. II.

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CHAP.

(a) See what has been said already, book xxx. last chapter towards the end.

(b) In the year 587, in Gregory of Tours, book 9.

* See the following chapter, where I shall speak more diffusely of those divisions; and the notes in which they are quoted.

CHAP. XX.

THE PRINCIPAL CAUSE OF THE HUMILIATION OF THE SECOND RACE.

Changes in the Allodia.

CHARLEMAGNE in the division (a) mentioned in the preceding chapter, ordained that after his death the vassals belonging to each king should be permitted to receive benefices in their own prince's dominions, and not in those (b) of another; whereas they * might keep their allodial estates in any of their dominions. But he adds † that every freeman might after the death of his lord vow fealty in any of the three kingdoms to whom he pleased, as well as he that never had had a lord. We find the same regulations in the division which Lewis the Pious made among his children in the year 817.

But though the freemen had vowed fealty for a fief, yet the count's militia was not thereby weakened; the freeman was still obliged to contribute for his *allodium*, and to get people ready for the service belonging to it, at the proportion of one man to four manors; or else to procure a man that should serve the fief in his stead. And when some abuses had been introduced upon this head, they were redressed, as appears by the constitutions ‡ of Charlemagne, and by that (c) of Pepin king of Italy, which explain each other.

The

(a) In the year 806, between Charles, Pepin, and Lewis; it is quoted by Goldast. and by Baluzius, tom. i. page 439.

(b) Art. 9. page 443. which is agreeable to the treaty of Andely in Gregory of Tours, book ix.

* Art. 10. and there is no mention made of this in the treaty of Andely.

† In Baluzius, tom. i. p. 574. *Licentiam habeat unusquisque liber homo qui seniore non habuerit, cuicumque ex his tribus fratribus voluerit, se commendandi*, art. 9. See also the division made by the same emperor in the year 837. art. 6. Baluzius's edition, page 686.

‡ In the year 811, Baluzius's edition, tom. i. page 486. art. 7. and 8. and that of the year, 812. *ibid.* page 490. art. 1. *Ut omnis liber homo qui quatuor mansos vestitos de proprio suo, five de alicujus beneficio, habet, ipse se preparet, et ipse in hostem pergat five cum seniore suo, &c.* See also the capitulary of the year 807. Baluzius's edition, tom. i. page 458.

(c) In the year 793, inserted in the law of the Lombards, book iii. tit. 9. chap. 9.

The remark made by historians, that the battle of Fontenay was the ruin of the monarchy, is very true; but I beg leave to cast on eye on the unhappy consequences of that day.

Some time after that battle, the three brothers, Lotharius, Lewis, and Charles, made a treaty (b), wherein I find some clauses which must have altered the whole political system of the French government.

In the declaration * which Charles made to the people of that part of the treaty relating to them, he says, that † every freeman might chuse whom he pleased for his lord, whether the king or any of the nobility. Before this treaty the freeman might vow fealty for a fief; but his *allodium* still continued under the immediate power of the king, that is, under the count's jurisdiction; and he depended on the lord to whom he had vowed fealty, only on account of the fief which he had obtained. After that treaty every freeman had a right to subject his *allodium* to the king, or to any other lord as he thought proper. The question is not concerning those who put themselves under the protection of another for a fief, but about those who changed their *allodium* into a fief, and withdrew themselves, as it were, from the civil jurisdiction, to enter under the feudal power of the king, or of the lord whom they thought fit to chuse.

Thus it was that those who formerly were only under the king's power, as freemen under the count, became insensibly vassals one of another, since every freeman might chuse whom he pleased for his lord, the king or any of the nobility.

2. If a man changed an estate, which he possessed in perpetuity, into a fief, this new fief could no longer be only for life.

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Hence

(b) In the year 847, quoted by Aubert Limire, and Baluzius, tom. ii. page 41. *Conventus apud Marfnam.*

* Adnunciatio.

† Ut unusquisque liber homo in nostro regno seniore quem voluerit in nobis & in nostris fidelibus accipiat, art. 2. of the Declaration of Charles.

Hence we see, a short time after, a * general law for giving the fiefs to the children of the present possessor: it was made by Charles the Bald, one of the three contracting princes.

What has been said concerning the liberty every freeman had in the monarchy, after the treaty of the three brothers, of chusing whom he pleased for his lord, the king or any of the nobility, is confirmed by the acts subsequent to that time.

In the reign † of Charlemagne, when a vassal had received a thing of a lord, were it worth only a fol, he could not afterwards quit him. But, under Charles the Bald, the vassals ‡ might follow their interests or their caprice with impunity; and this prince explains himself so strongly on this subject, that he seems rather to encourage them to enjoin this liberty, than to restrain it. In Charlemagne's time, benefices were rather personal than real; afterwards they became rather real than personal.

CHAP. XXI.

Changes in the Fiefs.

THE same changes happened in the fiefs, as in the *allodia*.

We find by the capitulary (a) of Compeigne, under king Pepin, that those who had received a benefice from the king, gave

* Capitulary of the year 877. tit. 53. art. 9, & 10. apud Carisiacum similiter & de nostris vassallis faciendum est, &c. This capitulary relates to another of the same place, art. 3.

† Capitulary of Aix-la-Chapelle, in the year 813, art. 16. quod nullus seniore suum demittat postquam ab eo acceperit valente solidum unum; and the capitulary of Pepin, in the year 783. art. 5.

‡ See the capitulary de Carisiaco, in the year 856. art. 10, & 13. Baluzius's edition, tom. ii. page 83. in which the king, together with the lords spiritual and temporal, agreed to this; Et si aliquis de vobis sit, cui suus senioratus non placet, & illi simulat ad alium seniore melius quam ad illum acaptare possit, veniat ad illum, & ipse tranquillo & pacifico animo donet illi commeatum * * * & quod Deus illi cupierit ad alium seniore acaptare potuerit, pacifice habeat.

(a) In the year 757. art. 6. Baluzius's edition, page 181.

gave a part of this benefice to different bondmen ; but these parts were not distinct from the whole. The king revoked them when he revoked the whole ; and at the death of the king's vassal, the rear-vassal lost also his rear-fief ; and a new beneficiary succeeded, who likewise established new rear-vassals. Thus it was the person, and not the rear-fief, that depended on the fief : on the one hand, the rear-vassal returned to the king, because he was not tied for ever to the vassal ; and the rear-fief returned also to the king, because it was the fief itself, and not a dependence of it.

Such was the rear vassalage, while the fiefs were during pleasure ; and such was it also, while they were for life. This was altered when the fiefs descended to the next heirs, and the rear-fiefs the same. That which was held before immediately of the king, was held now mediately ; and the regal power was thrown back, as it were, one degree ; sometimes two, and oftentimes more.

We find in the books (a) of the fiefs, that though the king's vassals might give away in fief, that is, in rear-fief, to the king, yet these rear-vassals or petty vassals could not give also in fief ; so that whatever they had given, they might always resume. Besides, a grant of that kind did not descend to the children like the fiefs, because it was not supposed to have been made according to the law of the fiefs.

If we compare the situation in which the rear-vassalage was at the time when the two Milanese senators wrote that book, to what it was under king Pepin, we shall find that the rear-fiefs preserved * their primitive nature longer than the fiefs.

But when those senators wrote, such general exceptions had been made to this rule, as had almost abolished it. For if a person (b) who had received a fief of a rear-vassal, happened to follow

(a) Book i. chap. 1.

(b) Book i. of the fiefs, chap. 1.

* At least in Italy and Germany.

follow him upon any expedition to Rome, he was intitled to all the privileges of a vassal. In like manner, if he had given money to the rear-vassal to obtain the fief, the latter could not take it from him, nor hinder him from transmitting it to his son, till he returned him his money: in fine, this rule (a) was no longer observed in the senate of Milan.

CHAP. XXII.

Another Change which happened in the Fiefs.

IN Charlemagne's time (a) they were obliged, under great penalties, to repair to the general meeting in case of any war whatsoever; they admitted of no excuses, and if the count exempted any one, he was liable himself to be punished. But the treaty of the three brothers (b) made a restriction * upon this head, which rescued the nobility, as it were, out of the king's hands; they were no longer obliged to serve in time of war, but when the war was defensive. In others, they were at liberty to follow their lord, or to mind their business.

The death of an hundred thousand French, at the battle of Fontenay, made the few remains of the nobility imagine, that by the private quarrels of their kings, about their respective shares, they should be utterly exterminated, and that their ambition and jealousy would cause the effusion of what little blood was left. A law was therefore passed, that the nobility should not be obliged to serve their princes in the wars, unless it was

to

(c) Ibid.

(a) Capitulary of the year 802. art. 7. Baluzius's edition, page 365.

(b) Apud Marſnam in the year 847. Baluzius's edition page 42.

* Volumus ut cujuscumque nostrum homo in cujuscumque regno sit, cum seniore suo in hostem, vel aliis suis utilitatibus, pergat, nisi talis regni invasio quam LAMTUVERI dicunt, quod absit, accederit, ut omnis populus illius regni ad eam repellendam communiter pergat. art. 5, ibid. page 44.

to defend the state against a foreign invasion. This law (c) obtained for several ages.

CHAP. XXIII.

Changes which happened in the great Offices, and in the Fiefs.

EVERY thing seemed to be infected with a particular vice, and to be corrupted at one and the same time. I took notice, that in the beginning several fiefs had been alienated in perpetuity; but these were particular cases, and the fiefs in general preserved their nature; so that if the crown lost some fiefs, she had substituted others in their stead. I likewise took notice, that the crown had never alienated the great offices in perpetuity*.

But Charles the Bald made a general regulation, which equally affected the great offices and the fiefs. He ordained in his capitularies that the (a) counties should be given to the count's children, and that this regulation should also take place in respect to fiefs.

We shall see presently that this regulation received a much greater extent, inasmuch that the great offices and fiefs went even to more distant relations. From thence it followed, that the greatest part of the lords, who held immediately of the crown, held now only mediately. Those counts who formerly administered justice in the king's *placita*, and who led the freemen against the enemy, found themselves situated between the king and his freemen; and the king's power was removed further off another degree.

Again,

(c) See the law of Guy king of the Romans, among those which were added to the Salic law, and to that of the Lombards, tit. 6. § 2. in Echard.

* Some authors pretend, that the county of Toulouse had been given away by Charles Martel, and passed by inheritance down to Raymond the last count; but if this be true, it was owing to some circumstances, which might have been an inducement to chuse the counts of Toulouse from among the children of the last possessor.

(a) See his capitulary of the year 877. tit. 53. art. 9. 10, apud Carisiacum; this capitulary is relative to another of the same year and place, art. 3.

Again, it appears by the capitularies (b), that the counts had benefices annexed to their counties and vassals under them. When the counties became hereditary, the count's vassals were no longer the immediate vassals of the king; and the benefices annexed to the counties were no longer the king's benefices: the counts grew powerful, because the vassals they had already under them enabled them to procure others.

In order to be convinced how much the monarchy was thereby weakened towards the end of the second race, we have only to turn our eyes to what happened at the beginning of the third, when the multiplicity of rear-fiefs flung the great vassals into despair.

It was a custom (a) of the kingdom, that when the elder brothers had given shares to their younger brothers, the latter paid homage to the elder; so that the reigning lord held them only as a rear-fief. Philip Augustus, the duke of Burgundy, the counts of Nevers, Boulogne, St Paul, Dampierre, and other lords, declared (b) that henceforward, whether the fief was divided by succession, or otherwise, the whole should be held always of the same lord, without any intermediation. This ordinance was not generally followed; for as I have elsewhere observed, it was impossible to make general ordinances at that time; but many of our customs were regulated by them.

CHAP.

(b) The 3d capitulary of the year 812. art. 7. and that of the year 815. art. 5. on the Spaniards. The collection of the capitularies, book v. art. 228. and capitulary of the year 869. art. 2. and that of the year 677. art. 13. Baluzius's edition.

(a) As appears from Otho of Frisingen, of the actions of Frederic, book ii. chap. 29.

(b) See the ordinance of Philip Augustus in the year 1209. in the new collection.

CHAP. XXIV.

Of the nature of Fiefs after the Reign of Charles the Bald.

WE have observed that Charles the Bald ordained, that when the possessor of a great office or of a fief left a son at his death, the office or fief should devolve to him. It would be a difficult matter to trace the progress of the abuses which from thence resulted, and of the extension given to that law in each country. I find in the books (c) of the fiefs, that towards the beginning of the reign of the Emperor Conrad II. the fiefs situated in his dominions did not descend to the grandchildren: they descended only to one of the last possessor's children *, who had been chosen by the lord: thus the fiefs were given by a kind of election, which the lord made among the children.

We have explained in the sixteenth chapter of this book, in what manner the crown was in some respects elective, and in others hereditary, under the second race. It was hereditary, because the kings were always taken from that family, and because the children succeeded; it was elective, by reason the people chose from amongst the children. As things of a similar nature move generally alike, and one political law is constantly relatively to another, the same spirit was followed † in the succession of fiefs, as has been followed in the succession to the crown. Thus the fiefs were transmitted to the children by the right of succession, as well as of election; and each fief was become both elective and hereditary, like the crown.

VOL. II.

3 D

This

(c) Book i. tit. 1.

* Sic progressum est, ut ad filios deveniret in quem Dominus hoc vellet beneficium confirmare. Ibid.

† At least in Italy and Germany.

This right of election in the person of the lord, was not subsisting † at the time of the authors (a) of the books of fiefs, that is, in the reign of the Emperor Frederick I.

It is mentioned in the books of the fiefs, that when ‡ the Emperor Conrad set out from Rome, the vassals in his service presented a petition to him, that he would please to make a law, that the fiefs which descended to the children should descend also to the grandchildren; and that he whose brother died without legitimate heirs, might succeed to the fief which had belonged to their common father: This was granted.

In the same place it is said, (and we are to remember, that those writers || lived at the time of the Emperor Frederic I.) that the ancient civilians § had always been of opinion, that the succession of fiefs in a collateral line did not extend further than to cousin-germans by the father's side, though of late it was carried as far as the seventh degree, as by the new code they had extended it in a direct line *in infinitum*. It is thus that Conrad's law was insensibly extended.

All these things supposed, the bare reading of the history of France is sufficient to shew, that the perpetuity of fiefs was established earlier in France than in Germany. Towards the commencement of the reign of the Emperor Conrad II. in 1024, things were upon the same footing still in Germany, as they had been in France under the reign of Charles the Bald, who died in 877. But such were the changes made in France after the reign of Charles the Bald, that Charles the Simple found himself

† Quod hodie ita stabilitum est, ut ad omnes æqualiter veniat, book i. of the fiefs, tit. 1.

(a) Gerardus Niger and Aubertus de Orto.

‡ Cum vero Conradus Romam proficisceretur, petiit a fidelibus qui in ejus erant servitio, ut, lege ab eo promulgata, hoc etiam ad nepotes ex filio producere dignaretur, & ut frater fratri sine legitimo hærede defuncto in beneficio quod eorum patris fuit, succedat, book i. of fiefs, tit. 1.

|| Cujas has proved it extremely well.

§ Sciendum est, quod beneficium advenientes ex latere, ultra fratres patruèles non progreditur successione ab antiquis sapientibus constitutum, licet moderno tempore usque ad septimum genericulum sit usurpatum, quod in masculis descendantibus nove jure in infinitum extenditur. Ibid.

himself unable to dispute with a foreign house his incontestable right to the empire; and, in fine, that in Hugh Capet's time, the reigning family, stripped of all its demesnes, was no longer able to maintain the crown.

The weak understanding of Charles the Bald produced an equal weakness in the French monarchy. But as Lewis king of Germany, his brother, and some of his successors, were men of better parts, their government preserved its vigour much longer.

But what do I say? Perhaps the flegmatic temper, and, if I dare use that expression, the immutability of spirit peculiar to the German nation, made a longer stand than that of the French nation, against this disposition of things, which perpetuated the fiefs, by a natural tendency, in families.

Besides, the kingdom of Germany was not laid waste, and annihilated, as it were, like that of France, by that particular kind of war with which it had been harrassed by the Normans and Saracens. There were less riches in Germany, fewer cities to plunder, less coasts to scour, more marches to get over, more forests to penetrate. The princes, who did not see every instant their dominions ready to fall to pieces, had less need of their vassals, and consequently had less dependance on them. And in all probability, if the emperors of Germany had not been obliged to be crowned at Rome, and to make continual expeditions into Italy, the fiefs would have preserved their primitive nature much longer in that country.

CHAP. XXV.

In what manner the Empire was transferred from the Family of Charlemagne.

THE empire, which, in prejudice to the branch of Charles the Bald, had been already given to the * bastard line of Lewis
 3 D 2 king

* Arnold, and his son Lewis IV.

king of Germany, was transferred to a foreign house by the election of Conrad, duke of Franconia, in 912. The reigning branch in France, which was hardly able to dispute a few villages, was much less in a situation to dispute the empire. We have an agreement which passed between Charles the Simple and the emperor Henry I. who had succeeded to Conrad. It is called the compact of Bon (a). These two princes met in a vessel which had been placed in the middle of the Rhine, and swore eternal friendship. They used on this occasion an excellent *middle term*. Charles took the title of King of West France, and Henry that of King of East France. Charles contracted with the king of Germany, and not with the emperor.

CHAP. XXVI.

In what manner the Crown of France was transferred to the House of Hugh Capet.

THE inheritance of the fiefs, and the general establishment of rear-fiefs, extinguished the political, and formed a feudal government. Instead of that prodigious multitude of vassals who were formerly under the king, there were now a few only, on whom the others depended. The kings had scarce any longer a direct authority; a power which was to pass through so many and through such great powers, either stopt, or was lost before it reached its term. Those great vassals would no longer obey; and they even made use of their rear-vassals to withdraw their obedience. The kings, deprived of their demesnes, and reduced to the cities of Rheims and Laon, were left exposed to their mercy; the tree stretched out its branch too far, and the head was withered. The kingdom found itself without a demesne, as the empire is at present. The crown was therefore given to one of the most potent vassals.

The

(a) In the year 936, quoted by Aubert le Mire, Cod. donationum piarum. chap. 27.

The Normans ravaged the kingdom ; they came in a kind of boats or small vessels, entered the mouths of rivers, and laid the country waste on both sides. The cities of Orleans * and Paris put a stop to those plunderers, so that they could not advance further, either on the Seine, or on the Loire. Hugh Capet, who was master of those cities, held in his hands the two keys of the unhappy remains of the kingdom ; the crown was conferred upon him as the only person able to defend it. It is thus the empire was afterwards given to a family whose dominions form so strong a barrier against the Turks.

The empire went from Charlemagne's family, at a time when the inheritance of fiefs was established only as a mere condescendence. It even appears, that it obtained much later among the Germans than among the French ; which was the reason that the empire, considered as a fief, was elective. On the contrary, when the crown of France went from the family of Charlemagne, the fiefs were really hereditary in this kingdom ; and the crown as a great fief was also hereditary.

But it is very wrong to refer to the very moment of this revolution, all the changes which had already happened, or happened afterwards. The whole was reduced to two events ; the reigning family changed, and the crown was united to a great fief.

CHAP. XXVII.

Some consequences of the Perpetuity of Fiefs.

FROM the perpetuity of the fiefs it followed, that the right of seniority or primogeniture was established among the French. This right was quite unknown under the first race (a) ; the crown was divided among the brothers, the *allodia* were divided in the same

* See the capitulary of Charles the Bald, in the year 877, apud Carisiacum, on the importance of Paris, St Denis, and the castles on the Loire, in those days.

(a) See the Salic law, and the law of the Ripuarians in the title of *Allodia*.

same manner ; and as the fiefs, whether precarious or for life, were not an object of succession, neither could they be of division.

Under the second race, the title of emperor, which Lewis the Pious enjoyed, and with which he honoured his eldest son Lotharius, made him think of giving this prince a kind of superiority over his younger brothers. The two kings * were obliged to wait upon the emperor every year, to carry him presents, and to receive much greater from him ; they were to consult with him upon common affairs. This is what inspired Lotharius with those pretences which met with such bad success. When Agobard † wrote in favour of this prince, he alledged the emperor's own regulation, who had associated Lotharius to the empire, after he had consulted the Almighty by a three days fast, and by the celebration of the holy sacrifices ; after the nation had sworn allegiance to him, which they could not refuse without perjuring themselves, and after he had sent Lotharius to Rome to be confirmed by the Pope. He lays a stress upon all this, and not upon his right of primogeniture. He says indeed, that the emperor had designed a division among the younger brothers, and that he had given the preference to the elder ; but saying he had preferred the elder, was saying at the same time that he might have preferred his younger brothers.

But as soon as the fiefs were become hereditary, the right of seniority was established in the succession of the fiefs ; and for the same reason in that of the crown, which was the great fief. The ancient law of divisions was no longer subsisting ; the fiefs being charged with a service, the possessor must have been enabled to discharge it. The right of primogeniture was established, and the reason of the feudal law forced that of the political or civil law.

As

* See the capitulary of the year 817, which contains the first division made by Lewis the Pious among his children.

† See his two letters upon this subject, the title of one of which is *de divisione imperii*.

As the fiefs descended to the children of the possessor, the lords lost the liberty of disposing of them; and, in order to indemnify themselves on that account, they established what they called the right of redemption, whereof mention is made in our customs, which at first was paid in a direct line, and by usage came afterwards to be paid only in a collateral line.

* The fiefs were soon rendered transferable to strangers, as a patrimonial estate. This gave rise to the right of fines of alienation, which were established almost throughout the whole kingdom. These rights were arbitrary in the beginning; but when the practice of granting these permissions was become general, they were fixed in every district.

The right of redemption was to be paid at each change of heir, and at first was paid even in a direct line (a). The most general custom had fixed it to one year's income. This was burdensome and inconvenient to the vassal, and affected in some measure the fief itself. It was often agreed * in the act of homage, that the lord should no longer demand more than a certain sum of money for the redemption, which by the changes incident to money became afterwards of no manner of importance. Thus the right of redemption is in our days reduced almost to nothing, while that of the fines of alienation is continued in its full extent. As this right concerned neither the vassal nor his heirs, but was a fortuitous case, which no one was obliged to foresee or expect, these kinds of stipulations were not made, and they continued to pay a certain part of the price.

When the fiefs were for life, they could not give a part of a fief to hold in perpetuity as a rear-fief; for it would have been absurd, that a person who had only the usufruct of a thing should dispose of the property of it. But as soon as they became perpetual,

(a) See the ordinance of Philip Augustus, in the year 1209, on the fiefs.

* We find several of these conventions in the charters, as in the register-book of Vendôme, and that of the abbey of St Cyprian in Poitou, of which Mr Galland has given some extracts, page 55.

petual, this was † permitted, with some restrictions made by the customs ‡, which was what they call dismembering their fief.

The perpetuity of the fiefs having established the right of redemption, the daughters were rendered capable of succeeding to a fief, in default of male issue. For when the lord gave the fief to his daughter, he multiplied the cases of his right of redemption, because the husband was obliged to pay it as well as the wife ||. This regulation could not take place in regard to the crown; for as it was not held of any one, there could be no right of redemption over it.

The daughter of William V. count of Toulouse, did not succeed to the county. Afterwards, Eleanor succeeded to Aquitaine, and Mathildis to Normandy; and the right of the succession of females seemed so well established in those days, that Lewis the Young, after his divorce from Eleanor, made no difficulty in restoring Guienne to her. But as these two last instances followed close to the first, the general law by which the women were called to the succession of fiefs, must have been introduced much later * into the county of Toulouse, than into the other provinces of the kingdom.

The constitution of several kingdoms of Europe has followed the actual situation in which the fiefs were when those kingdoms were founded. The women succeeded neither to the crown of France, nor to the empire, because, at the establishment of those two monarchies, they were incapable of succeeding to fiefs. But they succeeded in kingdoms, whose establishment was posterior to that of the perpetuity of the fiefs, such as those founded by the conquests of the Normans, those by the conquests made on the Moors; and others, in fine, which beyond the limits

† But they could not abridge the fief, that is, abolish a portion of it.

‡ They fixed the portion which they could dismember.

|| This was the reason that the lords obliged the widow to marry again.

* Most of the great families had their particular laws of succession. See what M. de la Thaumassiere says concerning the families of Berry.

mits of Germany, and in later times, received in some measure a second birth by the establishment of Christianity.

When the fiefs were at will, they were given to such people as were capable of doing service for them, wherefore they were never bestowed on minors; but † when they became perpetual, the lords took the fief into their own hands, till the pupil came of age, either to increase their own profits, or to bring up the pupil in the military exercise. This is what our customs call the guardianship of a nobleman's children, which is founded on principles different from those of tutelage, and is entirely a distinct thing from it.

When the fiefs were for life, people vowed fealty for a fief, and the real delivery which was made by a scepter secured the fief, as it is now secured by homage. We do not find that the counts, or even the king's commissaries, received the homages in the provinces; nor is this function to be met with in the commissions of those officers, which have been handed down to us in the capitularies. They sometimes indeed made all the king's subjects take an oath of allegiance*; but this oath was so far from being an homage of the same nature as those afterwards established, that in the latter the oath of allegiance was an † action joined to homage, which sometimes followed and sometimes preceded it, but did not take place in all homages, was less solemn than homage, and quite a distinct thing from it.

VOL. II.

3 E

The

† We see in the capitulary of the year 877, apud Carisiacum, art. 3. Baluzius's edition, tom. 2. page 269. the moment in which the kings caused the fiefs to be administered in order to preserve them for the minors; an example followed by the lords, and which gave rise to what we have mentioned by the name of the guardianship of a nobleman's children.

* We find the formula thereof in the second capitulary of the year 802. See also that of the year 854. art. 13. and others.

† M. Du Cange, in the word *hominium*, page 1163. and in the word *fideltas*, page 474. cites the charters of the ancient homages, where these differences are found, and a great number of authorities which may be seen. In paying homage the vassal put his hand into that of his lord, and took his oath; the oath of fealty was made by swearing on the gospels. The homage was performed kneeling, the oath of fealty standing. None but the lord could receive homage, but his officers might take the oath of fealty. See Littleton, § 91. & 92. of homage, that is fidelity and homage.

The counts and the king's commissaries made those vassals whose (a) fidelity was suspected, give occasionally a security which was called *firmitas*; but this security could not be an homage, since the kings (b) gave it to one another.

And if the abbot Suger (c) makes mention of a chair of Dagobert, in which, according to the testimony of antiquity, the kings of France were accustomed to receive the homage of the nobility; it is plain that he employs here the notions and language of his own time.

When the fiefs descended to the heirs, the acknowledgment of the vassal, which at first was only an occasional thing, became a regular action. It was made in a more solemn manner, and was attended with more formalities, because it was to be a monument of the reciprocal duties of the lords and vassals through all succeeding ages.

I should be apt to think, that the homages began to be established under king Pepin, which is the time I mentioned that several benefices were given in perpetuity; but I should not think this without precaution, and only on supposition that the authors of the ancient annals (d) of the Franks were not ignorant pretenders, who in describing the act of fealty performed by Tassillon duke of Bavaria to king Pepin, spoke * according to the usages of their own time.

When the fiefs were either precarious or for life, they seldom had a relation to any other than the political laws; for which reason in the civil laws of those times there is very little mention made of the laws of fiefs. But when they were become hereditary,

(a) Capitularies of Charles the Bald, in the year 860. post reditum a Confluentibus, art. 3. Baluzius's edition, page 145.

(b) Ibid. art. 3.

(c) Lib. de administratione sua.

(d) Anno 757. chap. 17.

* Tassilo venit in vassatico se commendans, per manus sacramenta juravit multa & innumerabilia reliquiis sanctorum manus imponens, & fidelitatem promisit regi Pippinio. One would think that there was here an homage and an oath of fealty. See the penultimate note above.

hereditary, when there was a power of giving, selling, and bequeathing them, they had a relation then to the political and the civil laws. The fief, considered as an obligation to the military service, depended on the political law; considered as a kind of commercial property, it depended on the civil law. This gave rise to the civil laws concerning fiefs.

When the fiefs were become hereditary, the laws relating to the order of successions must have been relative to the law of the perpetuity of fiefs. Thus this rule of the French law, "Estates of inheritance do not ascend (b)," was established in spite of the Roman and Salic (c) laws. It was necessary that the fief should be served; but a grandfather or a great uncle would have been very bad vassals to give to the lord: wherefore this rule took place at first only in regard to the fiefs, as we learn of Boutillier (d).

When the fiefs were become hereditary, the lords, who were to see that the fief was served, insisted that the * daughters who were to succeed to the fief, and I fancy sometimes the males, should not marry without their consent; insomuch that the marriage-contracts became in respect to the lords both a feudal and a civil regulation. In an act of this kind under the lords inspection, regulations were made for the future succession, with a view that the fief might be served by the heirs: hence none but the nobility at first had the liberty of disposing of the future successions by marriage contract, as Boyer (e) and Aufrerius (f) have justly observed.

It is needless to mention that the power of redemption founded on the old right of the relations, a mystery of our ancient

(b) Book iv. de feudis, tit. 39.

(c) In the title of *allodia*.

(d) *Somme Rurale*, book i. tit. 76. p. 447.

* According to an ordinance of St. Lewis in the year 1246. to settle the customs of Anjou and Maine; those who shall have the care of the heirs of a fief shall give security to the lord, that she shall not be married without his consent.

(e) Decision 155. No. 8. & 204. & No. 38.

(f) In *Capel. thol. decision*, 453.

tient French jurisprudence, which I have not now time to unfold, could not take place with regard to the fiefs till they were become hereditary.

Italiam ! Italiam ! †

I finish my treatise of fiefs at a period where most authors commence theirs.

† The author concludes his elaborate work with an allusion to the joyful acclamations of Æneas's followers, upon coming in sight of the land of Italy they so much desired, after so long wanderings, great dangers and furious storms undergone in quest of it. *Æneid.* lib. iii. v. 522.

Humilemque videmus
*Italiam. Italiam ! primus conclamat Achates,
Italiam læto socii clamore salutant.*

FINIS.



